Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

October Term, 1998

AMELIA E. EDWARDS,

Petitioner,

v.

STEVEN M. CLARKE,

Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the imposition of sanctions on an attorney for allegedly "contemptuous" and "demeaning" language contained in a memorandum of law submitted to the Rhode Island Supreme Court, without any finding that the sanctioned language interfered with the orderly administration of justice and without affording the sanctioned attorney either notice or an opportunity to be heard, violates both the First and Fourteenth Amendments.

LIST OF PARTIES

In addition to the parties listed in the caption, Richard Morsilli and the Rhode Island Ethics Commission were Petitioners in the Rhode Island Supreme Court proceedings. Kathleen Tammelleo was co-counsel, together with Petitioner Amelia E. Edwards, to Richard Morsilli and the Rhode Island Ethics Commission, but is not joined as a party in this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Amelia E. Edwards ("Petitioner") respectfully petitions for a writ of certiorari to review the Order of the Rhode Island Supreme Court in this case.

OPINIONS BELOW

The Order of the Rhode Island Supreme Court on the basis of which Petitioner petitions for a writ of certiorari is an unpublished order. It is reproduced in the appendix at APP. p. 1-2, *infra*. It was issued on September 24, 1998 in the matter of *Steven M. Clarke v Richard Morsilli and the Rhode Island Ethics Commission*, C.A. No. 98-110.

BASIS FOR JURISDICTION

The Rhode Island Supreme Court entered its Order on September 24, 1998, in response to a petition for reargument. No procedure is available for petitioning for rehearing from such an Order. Jurisdiction to review this Order by writ of certiorari is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech."

Section I of the Fourteenth Amendment of the United States Constitution provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

The Rhode Island Supreme Court Rule of Appellate Procedure 25(a) provides, in pertinent part:

> **Reargument.** – (a) *Petitions.* Petitions for reargument of causes heard and decided . . . shall be filed in the office of the clerk within five (5) days after filing of the decision. . . . The petitioner shall file with his or her petition a memorandum setting forth the grounds upon which he or she relies.

STATEMENT

Petitioner herein is an attorney who was sanctioned by the Rhode Island Supreme Court for remarks contained in a memorandum of law submitted to that Court. The Petitioner is legal counsel to the Rhode Island Ethics Commission (the "Commission"), a state agency charged with the power to investigate and adjudicate allegations of violations of the government code of ethics set forth in R.I.G.L. §§ 36-14-4 – 36-14-7. On July 26, 1996, the Commission issued a Decision and Order finding Respondent Steven M. Clarke, a member of the Rhode Island Board of Registration for Professional Engineers, in violation of the Rhode Island Code of Ethics. Clarke filed an appeal to the Providence County Superior Court.

On February 10, 1998, the Superior Court reversed the Commission's Decision. The Superior Court found

that Clarke had violated the Code of Ethics, but ruled that the complaint against Clarke should have been dismissed because the Commission had failed to "complete its investigation" of Clarke within the statutory time limits of R.I.G.L. § 36-14-12(c), which provides:

> Upon receipt of a written complaint alleging a violation of this chapter, the commission shall within one hundred eighty (180) days of receipt of the written complaint complete its investigation; provided that, the commission may, for good cause shown, grant no more than two (2) extensions of sixty (60) days each. R.I.G.L. § 36-14-12(c).

In its ruling, the Superior Court construed the words "complete its investigation" to require that the Commission not only file its investigative report within the time frame set forth in R.I.G.L. § 36-14-12(c), but also render its probable cause determination within that time frame.

The Commission sought review of this ruling by the Rhode Island Supreme Court, challenging, *inter alia*, the Superior Court's construction of the statutory words "complete its investigation."

On July 14, 1998, a three-judge panel of the Rhode Island Supreme Court issued its Opinion (the "Opinion"). *Clarke v Morsilli*, 714 A. 2d 597 (R.I. 1998). The Opinion affirmed the trial court's ruling, and specifically held that the statute requiring the Commission to "complete its investigation" within 180 days of the filing of a complaint, with two possible 60-day extensions, mandated that the Commission not only file its investigative report, but also make its determination of probable cause within that time frame. (Opinion, App. 1-2)

Pursuant to Rhode Island Rule of Appellate Procedure 25, the Commission then filed a Petition for Reargument, together with a supporting memorandum. Memorandum in Support of the Rhode Island Ethics Commission's Petition for Reargument (the "Memorandum") (App. 3-22). The Petition and Memorandum were filed pursuant to Rhode Island Supreme Court Rule of Appellate Procedure 25(a), which provides:

> **Reargument.** – (a) *Petitions.* Petitions for reargument of causes heard and decided . . . shall be filed in the office of the clerk within five (5) days after filing of the decision. . . . The petitioner shall file with his or her petition a memorandum setting forth the grounds upon which he or she relies.

The Rhode Island Supreme Court has held that the purpose of such a petition is "to afford a petitioner an opportunity to point out matters presented in the briefs and relied upon in the original argument which he believes were overlooked or misapprehended by the appellate court in reviewing the case." *Brimbau v Ausdale Equip. Rental Corp.*, 389 A. 2d 1254, 1255 (R.I. 1978).

The Memorandum in question, which contained a 3-paragraph introduction followed by ten pages of argument, opened with a vociferous statement of the Commission's position with respect to the perceived inadequacies of the Rhode Island Supreme Court's Opinion:

> Pursuant to Supreme Court Rule of Appellate Procedure 25, the Rhode Island Ethics Commission (the "Commission") has filed a Petition for reargument before the full court regarding this Court's interpretation of the plain meaning of

> "complete its investigation" in R.I. Gen. Laws § 36-14-12(c) as reflected in this Court's Opinion dated July 14, 1998 (the "Opinion"). The Opinion is a shocking display of judicial indiscretion. It demonstrates judicial activism at its worst, in which the Court first determined what result it wished to reach and then squeezed its rationale to fit the result. The Opinion twists the facts and the law inappropriately to fit the result that the Court desired. In rejecting the Commission's agency interpretation, not only did the Court manage to fill the 8 page Opinion with factual errors (on which the Court relied) but it failed to apply its own well-settled precedent.

(Memorandum, App. 3-4)

In its Memorandum, the Commission then argued that (1) the Rhode Island Supreme Court's Opinion contained significant factual errors on which the Court relied in reaching its conclusions, (2) the Opinion disregarded the legislative history of the Act,[1] (3) the Court had not followed its own precedents concerning statutory construction, and (4) the practical result of the Court's Opinion would be the dismissal of the majority of cases presently pending adjudication before the Commission. (Memorandum, App. 1-17)

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[1] The Memorandum noted that, prior to 1992, R.I.G.L. § 36-14-12(c) had specifically required the Commission to render a probable cause determination within 180 days of the filing of a complaint, but that statutory amendments in 1992 had deleted the reference to probable cause determination from this section of the statute. Memorandum in Support of the Rhode Island Ethics Commission's Petition for Reargument, (App. 8-10)

Respondent Steven M. Clarke filed an objection to the Petition for Reargument, together with his own supporting memorandum. Respondent's Memorandum in Support of Its Objection to Petitioner's Petition for Reargument ("Respondent's Memorandum") (App. 23-26). The Respondent's Memorandum is replete with harshly critical language directed at the Commission's Memorandum and at the Rhode Island Ethics Commission and its Executive Director. Respondent's Memorandum characterized the Commission's Memorandum as "an insulting, disrespectful and outrageous document," a "frivolous and outrageous motion," "shocking and unforgivable," "galling," "one of the strangest documents I have ever encountered other than from a pro se litigant," and "the Commission's latest harangue in Motion garb." (Respondent's Memorandum, App. 23-24) It described the Commission's director as "the Commission's Executive Director, Prosecutor, Lobbyist, Lawyer, Clerk of the Adjudicative Court and Grand Panjandrum of ethical truth." (Respondent's Memorandum, App. 24) It demanded that the Petition for Reargument be denied, and that Respondent's counsel be awarded attorney's fees incurred in defending against the Petition.

No provisions in the Rhode Island Supreme Court Rules of Appellate Procedure allow for the filing of a reply to a Memorandum in Support of an Objection to a Petition for Reargument. Hence, the Commission and its attorneys filed no response to Respondent's Memorandum.

On September 24, 1998, the Rhode Island Supreme Court issued its Order (the "Order") denying the Commission's petition for reargument. At the same time,

without providing the Commission's legal counsel with prior notice or an opportunity to be heard, the Rhode Island Supreme Court imposed sanctions on legal counsel personally, based on what the Court deemed to be inappropriate language contained in the Memorandum. The Order makes it clear that the sanction of paying counsel fees was imposed solely because the Court deemed the Memorandum's language criticizing the court's Opinion "contemptuous," "demeaning to this Court," "disrespectful" and "offensive." Although the Order refers to efforts "to promote civility in our courts," it does not contain any finding that the sanctioned language interfered with the orderly administration of justice in this case. The Order, in full, states:

> The Rhode Island Ethics Commission (commission) has sought reargument in respect to our July 14, 1998 *per curiam* opinion that denied the commission's petition for certiorari in this case. Although we deem the petition for reargument to be without merit and deserving only of a terse denial, we are constrained to view otherwise the request of respondent's counsel for an attorney's fee for time spent in preparing a reply to the commission's petition. A number of the remarks contained in the memorandum in support of reargument, prepared for the commission by attorneys Katherine Tammelleo and Amelia E. Edwards, are contemptuous and demeaning to this Court. The intemperate statements and disrespectful tone cannot be disregarded. Indeed, these remarks were the primary focus of much of respondent's reply memorandum. Such offensive language completely disregards and undermines the efforts that this Court has initiated and encouraged in its attempts to

promote civility in our courts. We are of the opinion that the scorn directed at the justices of this Court in a document filed with this Court's clerk's office must be addressed.

It is our opinion that "[c]ontemptuous tactics and arguments can be as easily made on paper as in open court." *Kunik v Racine County, Wisconsin*, 946 F. 2d 1575, 1583 (7th Cir. 1991). Moreover, it is well-established that this Court under its general supervisory powers can exercise its inherent power to fashion an appropriate remedy to service the ends of justice. *Vincent v Musone*, 574 A. 2d 1234, 1235 (R.I. 1990); *Cheetham v Cheetham*, 121 R.I. 337, 342, 397 A. 2d 1331, 1334 (1979). "If ever there was a case in which a remedy should be fashioned, this is such a controversy." *Cheetham*, 121 R.I. at 342, 397 A. 2d at 1334. Accordingly, this Court directs that the following order shall enter.

1. The petition for reargument is denied.

2. This Court is of the opinion that a sanction in the nature of counsel fees in responding to the petition for reargument is warranted. Therefore, respondent's request for a counsel fee is granted in the amount of $1500. This sum shall be paid personally by attorneys Tammelleo and Edwards and is not to be paid from any funds of the Rhode Island Ethics Commission.

Entered as an Order of this Court this 24th day of September, 1998.

Order (App. 1-2)

Petitioner was given neither notice nor opportunity to be heard prior to the imposition of this sanction. Nor

does any procedure exist, under Rhode Island statutes or appellate rules, whereby she can request a further hearing before the Rhode Island Supreme Court on the propriety of the sanctions imposed. Because there are no procedural mechanisms to do so, she has had no opportunity to respond to the charge that the Memorandum was "contemptuous," "demeaning" or "disrespectful", nor has she been afforded an opportunity to challenge the propriety of the sanctions imposed.

REASONS FOR GRANTING THE PETITION

This case raises the question of whether an appellate court's sanction of an attorney violates the attorney's rights to freedom of expression and due process of law and has an unconstitutional chilling effect on vigorous advocacy, when the sanction is summarily imposed without prior notice, warning or opportunity to be heard, and without a finding that the attorney's actions interfered with the administration of justice, and when the sanction is imposed because the attorney submitted to the court a memorandum of law critical of the court's opinion in a pending case.

This Court has not previously addressed the question of whether the inherent powers of a court can be invoked to summarily sanction an attorney, without prior notice or opportunity to be heard and without any finding that the attorney's actions interfered with the administration of justice in the pending case, because the attorney submitted to the court a memorandum of law containing language which the court deems "contemptuous," "demeaning" and "disrespectful". However, attorneys have been sanctioned in a number of states for filing legal

documents containing language critical of the court to which the document was submitted.[2] In light of the expanding use of sanctions by the courts, it is an issue which is likely to continue to arise. The summary imposition of sanctions imposed under such circumstances has a chilling effect on the vigorous advocacy which is both a right and an ethical obligation of attorneys to pursue. The propriety of such sanctions and the procedures for imposing them are therefore an issue which this Court should address in light of its repeated admonitions that judges, like other public figures, are not immune from public criticism and that a court's inherent powers, because of their potency, must be exercised with restraint and discretion, and in accordance with the mandates of due process. *Roadway Express Inc. v Piper,* 447 U.S. 752 (1980); *Ex Parte Burr,* 9 Wheat. 529 (1824).

The Memorandum in this matter was submitted in support of a petition to reargue a case decided by the Rhode Island Supreme Court. Pursuant to Rhode Island Supreme Court Rule of Appellate Procedure 25(a), such a memorandum must seek "to point out matters presented in the briefs and relied upon in the original argument which [the petitioner] believes were overlooked or misapprehended by the appellate court in reviewing the case." *Brimbau v Ausdale Equip. Rental Corp.,* 389 A. 2d 1254, 1255 (R.I. 1978).

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[2] *See, e.g., Matter of Frerichs,* 238 N.W. 2d 764 (Iowa, 1976), in which an attorney was admonished for statements contained in petitions for rehearing criminal appeals that, *inter alia,* the State Supreme Court was "willfully avoiding" constitutional questions.

In accordance with this requirement, the Memorandum emphasized those legal and factual points which the Petitioner believed the appellate court had misapprehended. She emphasized the perceived nature of the Court's misapprehension with admitted vehemence. But as this Court has held:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. . . .
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.

In re McConnell, 370 U.S. 230, 236 (1962).

This Court has repeatedly recognized that the Constitution protects far more than polite or timorous advocacy by attorneys. Almost a century ago, the Court ruled, in *In re Watts*, 190 U.S. 1 (1903), that attorneys who had given good faith, albeit incorrect, advice to a client could not be convicted of contempt. The Court held that "[t]he preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." *In re Watts*, 190 U.S. at 29. More recently, in *Maness v Meyers*, 419 U.S. 449 (1975), the

Court reversed a contempt citation against an attorney who had advised his client, on Fifth Amendment grounds, to refuse to turn over documents as ordered by a trial judge. The Court cited with approval the introductory comments of the American Bar Association Project on Standards for Criminal Justice, Defense Function § 1.6:

> A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate.

Maness v Meyers, 419 U.S. at 466, fn. 16 (1975).

Thus this Court has held that "the vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice." *In re Little,* 404 U.S. 553, 555 (1972), citing *Craig v Harney,* 331 U.S. 367, 376 (1947). Indeed, "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v Harney,* 331 U.S. 367, 376 (1947). Courts "must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown v U.S.,* 356 U.S. 148, 153 (1957).

Nevertheless, it was Petitioner's vehement language which the Rhode Island Supreme Court held "contemptuous," "demeaning to this Court," "intemperate," "offensive" and "disrespectful in tone" so as to justify summary imposition of sanctions on Petitioner and her co-counsel.

Judges have both the right and the obligation to regulate judicial proceedings before them so as to insure the fair and orderly administration of justice. In order to preserve this right and obligation, while at the same time safeguarding the principle that judges, like other public officials, are not immune from criticism and the principle that attorneys must be able to vigorously represent their clients, the inherent power of the courts to sanction attorneys for contempt should be reserved for those situations where there has been a demonstrable interference with the orderly administration of justice.[3] In the instant case, there have been no findings of any demonstrable interference with the administration of justice, and no notice or hearing which would permit such a finding. Under such circumstances, the absence of procedural protections afforded to the sanctioned attorney increases the likelihood of a chilling effect on "[t]he vigorous advocacy we demand of the legal profession." *Gentile v State Bar of Nevada*, 501 U.S. 1030 at 1058 (1978).

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[3] In an analogous context, this Court has upheld the First and Fourteenth Amendment rights of an attorney to hold a press conference concerning pending criminal charges against his client, during which the attorney charged the State with seeking indictment and conviction of an innocent man. As the Court noted, in overturning a disciplinary board's reprimand of the attorney for violating a court rule against extrajudicial statements, "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." The Court further noted that because judicial systems play a vital role in a democracy, "the public has a legitimate interest in their operations." *Gentile v State Bar of Nevada*, 501 U.S. at 1035.

Even attorney speech directly critical of a judge is constitutionally protected. As this Court observed in reversing an attorney's suspension from practice for making a public speech referring to the "horrible and shocking" things going on in a pending trial in which she was involved:

> If Judge Wiig was said [by the sanctioned attorney] to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed.

In re Sawyer, 360 U.S. 622, 635 (1959).

As in *In re Sawyer*, 360 U.S. 622 (1959), here, too, Petitioner's comments appear tame compared to some of the criticism recently leveled at the court majority by dissenting justices of the Rhode Island Supreme Court.[4]

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[4] See, e.g., the dissent of Mr. Justice Flanders in *Bandoni v State*, 715 A. 2d 580 (R.I. 1998), which begins with the statement, "This is a dark day for state constitutional law and judicial independence in Rhode Island. For crime victims in particular, this day will doubtless live in legal infamy." Mr. Justice Flanders goes on to describe the majority's opinion as "protest[ing] too much, persuad[ing] too little, and perturb[ing] throughout," and as taking "hamfisted swipes" at the dissent. 715 A. 2d at 601. Later, Mr. Justice Flanders charges that the Court, "[i]nstead of functioning as a key player in the protection of constitutional rights, . . . has withdrawn from the field to cower in the shadows of its intended constitutional role," has "allowed itself to become a penetrable bullseye for those who would shoot down crime victims' constitutional rights," and "has consigned the Judiciary in this constitutional case to serving as the liveried footservants of the General Assembly, waiting for

It has long been established that courts have inherent powers to protect themselves by punishing with

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some sign on high that it is permissible for this Court to enforce the constitutional rights that are so dear to the People of this State but which, says the majority, this Court is powerless to uphold without express legislative authorization to do so. I emphatically disagree with this shrunken and withered vision of judicial power, responsibility, and independence." 715 A. 2d at 602. Still later the dissent refers to the Court's "abject unwillingness" to enforce constitutional rights, and concludes that its decision has left a constitutional provision "to flap and twist in the political winds, utterly toothless and 'full of sound and fury, [s]ignifying nothing.' " 715 A. 2d at 603. Still later the dissent describes the majority as turning "a stone-deaf ear on [crime victims'] pleas for judicial relief even as it sheds crocodile tears for their plight." He characterizes the majority as having a "desiccated view of the judicial landscape," and a vision of the judicial function under which the state constitution "would be stillborn until and unless the Legislature deigned to breathe life into its legal corpse by untying the Judiciary's hands to enforce its majestic provisions," an approach which he describes as "dead-on-arrival jurisprudence." 715 A. 2d at 604. He describes the majority's praise of the legislature as "the sound of one hand clapping while the other wields a broad sword to make quick work of . . . crime victims' attempts to exercise specific rights." He describes the majority's reasoning as a "constitutionally feckless rationale it has adopted to justify this terrible result." 715 A. 2d at 605. He criticizes the majority's "seeming inability to comprehend that no state constitutional rights can be 'enjoyed' unless and until this Court is prepared to enforce such rights," and he accuses the majority of being "unable to grasp" certain concepts. 715 A. 2d at 606.

See also Mr. Justice Bourcier's dissent in *State v DiPrete*, 710 A. 2d 1266 (1998), in which he directly questioned the motives of the majority in overturning a trial judge's dismissal of a criminal indictment in a highly publicized case involving an ex-Rhode Island governor. In his dissent, Mr. Justice Bourcier characterized the majority as "either overlook[ing] or ignor[ing]

sanctions individuals who defy their authority or interfere with the administration of justice. *Ex Parte Terry*, 128 U.S. 289 (1888). However, it has also been recognized that, because of their very potency, inherent powers must be exercised with restraint and discretion. *Chambers v NASCO, Inc.*, 501 U.S. 32 (1991); *Roadway Express Inc. v Piper*, 447 U.S. 752 (1980); *Ex Parte Burr*, 9 Wheat. 529, 531 (1824).

The facts of this case dramatically illustrate the constitutional dangers when a court resorts to its inherent powers to summarily sanction those who criticize it. The language for which the Petitioner was sanctioned, while vehement, is mild compared to the criticism which appellate judges, including justices of the Rhode Island

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the existence of the unquestionable statutory authority that supports the trial justice's dismissal order in this case. . . . " 710 A. 2d at 1295. Finding no precedent for the majority's legal position, Mr. Justice Bourcier concludes that it appeared to be "fashioned apparently only for this particular appeal." 710 A. 2d at 1296. He comments further that "[u]nfortunately my colleagues in the majority have abandoned . . . precedent, and in so doing, one is left to surmise that perhaps adherence to precedent would not have permitted the desired end in this case, and therefore, precedent was sacrificed on the altar of expedience." 710 A. 2d at 1296. His closing remarks imply that the majority was motivated not by legal considerations but by the notoriety of the defendant and the court's concern for public opinion: "The 'great case' now before this Court should not have persuaded the majority to abandon our well-established standard of review upon which trial justices and litigants alike have come to rely and depend. Rather we should all stand firm and apply the law evenhandedly regardless of who stands at the bar of justice before us and of the vagaries of public sentiment." 710 A. 2d at 1296.

Supreme Court, have leveled at each other.[5] Nor was Petitioner's language more harsh than the language in the Memorandum submitted by Respondent's counsel, who was awarded attorney's fees.

No standards existed to warn Petitioner in advance that she might be sanctioned for her Memorandum's vociferous criticism of the Court's opinion. Nor did the Rhode Island Supreme Court enunciate any such standards in finding Petitioner's Memorandum contemptuous and in imposing sanctions on her. The "criteria" for imposing the sanctions in question were, at best, ill-defined, imprecise and open-ended. Indeed, beyond stating that "a number of remarks" in the Memorandum were contemptuous, demeaning to the Court, intemperate and disrespectful in tone, the Order did not even state which words in the Memorandum the Court considered sanctionable. Such a use of a court's inherent powers is an expansion far beyond the reach previously approved by this Court, and raises the specter of vague and standardless regulation and punishment of attorney advocacy, in derogation of the mandates of both the First and the Fourteenth Amendments.

This Court has long recognized, in other contexts, that such ill-defined and imprecise regulation of speech raises concerns about both vagueness and selective enforcement. Such ill-defined regulations contravene the fundamental requirement of due process that "[a]ll are entitled to be informed as to what the State commands or

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[5] See dissents of Mr. Justice Flanders and Mr. Justice Bourcier, quoted in footnote 4 *supra*.

forbids." *Lanzetta v New Jersey*, 306 U.S. 451, 453 (1939). This requirement is particularly compelling when the punishable activity is speech, because of the chilling effect of vague prohibitions on individuals' willingness to exercise their First Amendment rights. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v Button*, 371 U.S. 415, 433 (1960). When an attorney is summarily sanctioned for a memorandum which criticizes a court opinion in terms less harsh than those recently used by dissenting members of the same court in criticizing opinions of their colleagues in the majority, the criteria for imposing such sanctions are necessarily so ambiguous that reasonable people, including reasonable attorneys, can do no more than guess at their meaning. Such ill-defined criteria may not only "trap the innocent by not providing fair warning," *Hynes v Mayor of Oradell*, 425 U.S. 610 (1976), but may indeed create "a trap for the wary as well as the unwary." *Gentile v State Bar of Nevada*, 501 U.S. at 1051.

Ill-defined criteria for imposing sanctions on an attorney who criticizes a court's opinion in a brief or memorandum have the additional potential, condemned by this Court in other contexts, of chilling the vigorous advocacy which is essential to the functioning of the American system of adversarial justice. *See Gentile v State Bar of Nevada*, 501 U.S. 1030 (1978); *Maness v Meyers*, 419 U.S. 449 (1975); *In re McConnell*, 370 U.S. 230 (1962); *Holt v Virginia*, 381 U.S. 131 (1965); *In re Watts*, 190 U.S. 1 (1903).

Vague regulation of speech also creates an impermissible risk of discriminatory enforcement, "for history shows that speech is suppressed when either the speaker

or the message is critical of those who enforce the law." *Gentile v State Bar of Nevada*, 501 U.S. at 1051. The question in such circumstances "is not whether discriminatory enforcement occurred here, . . . but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v State Bar of Nevada*, 501 U.S. at 1051. There is a significant risk of discriminatory imposition of sanctions when their imposition is based on whether the court, acting without guidelines, prior notice or hearing, sanctions an attorney's criticism of a judicial opinion as "intemperate," "demeaning," "disrespectful," or "contemptuous."

Furthermore, the use of summary procedures to sanction an attorney under circumstances such as obtain in this case has never been approved by this Court, and is counter to this Court's repeated admonitions that inherent powers must be exercised with restraint and discretion and in accordance with due process of law.

It has long been held that courts have inherent powers to protect themselves by punishing with sanctions individuals who defy their authority or interfere with the administration of justice. *Ex Parte Terry*, 128 U.S. 289 (1888). Thus in *Link v Wabash R. Co.*, 370 U.S. 626 (1962), this Court recognized the inherent power of a court to levy sanctions in response to abusive litigation practices. However, this Court has repeatedly emphasized that, because of their very potency, inherent powers must be exercised with restraint and discretion. *Chambers v NASCO, Inc.*, 501 U.S. 32 (1991); *Ex Parte Burr*, 9 Wheat. 529, 531 (1824). Indeed, members of this Court have expressed concern as to the dangers and impropriety of broad extensions of courts' inherent authority to impose

sanctions. *Chambers v NASCO, Inc.*, 501 U.S. at 60 (1991) (Kennedy, J., dissenting).

Thus, although federal courts have the inherent power to assess attorney's fees against counsel, such power can be exercised only "in narrowly defined circumstances," *Roadway Express Inc. v Piper*, 447 U.S. at 765. In *Roadway Express*, the Court examined what sanctions could be imposed on lawyers who unreasonably extend court proceedings. After determining that 28 U.S.C. § 1927, as it then existed, would not allow for assessment of attorney's fees, the Court remanded the case for consideration of sanctions under both Rule 37 and the court's inherent power. In doing so, however, the Court emphasized that the invocation of the court's inherent power would require a finding of bad faith and willful abuse of the judicial process by the attorney. 447 U.S. at 766-7. Additionally, the Court noted:

> Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.

Roadway Express Inc. v Piper, 447 U.S. at 766 (1980). Similarly the Court held in *Chambers v NASCO, Inc.*, 501 U.S. 32 (1991) that:

> A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees.

Chambers v NASCO, Inc., 501 U.S. at 50.

Cases upholding the imposition of sanctions in the form of counsel fees have noted with approval that the sanctioned party received both notice and an opportunity to be heard before sanctions were imposed. Thus in *Chambers v NASCO, Inc.*, 501 U.S. 32 (1991), the Court noted that the sanctioned party had "received repeated timely warnings both from NASCO and the court that his conduct was sanctionable," 501 U.S. at 56, and that the sanction of attorney's fees was imposed only "[a]fter full briefing and a hearing." 501 U.S. at 40.

Sanctions levied on Petitioner herein were imposed in direct violation of the mandate that persons facing sanctions pursuant to the inherent powers of the court be afforded notice and an opportunity for a hearing prior to the imposition of such sanctions. These sanctions were further levied without any finding that Petitioner's actions jeopardized in any way the orderly administration of the court. When a court thus acts summarily on the basis of its inherent powers, pursuant to vague and ill-defined standards, and imposes sanctions on an attorney based on critical comments contained in the attorney's memorandum filed with the court, and when those sanctions are imposed without prior notice, opportunity for hearing, or any finding that the orderly administration of justice has been jeopardized in any manner, such procedures violate fundamental mandates of due process and unconstitutionally chill the exercise of vigorous advocacy which is both the right and the obligation of attorneys as participants in our judicial process.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

AMY R. TABOR
AMERICAN CIVIL LIBERTIES UNION
RHODE ISLAND AFFILIATE
HARDY TABOR & CHUDACOFF
24 Spring Street
Pawtucket, R.I. 02860
Tel. 401-727-1616

Supreme Court

No. 98-110-M.P.

Steven M. Clarke :

v. :

Richard Morsilli et al. :

ORDER

The Rhode Island Ethics Commission (commission) has sought reargument in respect to our July 14, 1998 *per curiam* opinion that denied the commission's petition for certiorari in this case. Although we deem the petition for reargument to be without merit and deserving only of a terse denial, we are constrained to view otherwise the request of respondent's counsel for an attorney's fee for time spent in preparing a reply to the commission's petition. A number of the remarks contained in the memorandum in support of reargument, prepared for the commission by attorney's Katherine Tammelleo and Amelia E. Edwards, are contemptuous and demeaning to this Court. The intemperate statements and disrespectful tone cannot be disregarded. Indeed, these remarks were the primary focus of much of respondent's reply memorandum. Such offensive language completely disregards and undermines the efforts that this Court has initiated and encouraged in its attempts to promote civility in our courts. We are of the opinion that the scorn directed at the justices of this Court in a document filed with this Court's clerk's office must be addressed.

It is our opinion that "[c]ontemptuous tactics and arguments can be as easily made on paper as in open court." *Kunik v. Racine County, Wisconsin*, 946 F.2d 1574, 1583 (7th Cir. 1991). Moreover, it is well-established that this Court under its general supervisory powers can exercise its inherent power to fashion an appropriate remedy to serve the ends of justice. *Vincent v. Musone*, 574 A.2d 1234, 1235 (R.I. 1990); *Cheetham v. Cheetham*, 121 R.I. 337, 342, 397 A.2d 1331, 1334 (1979). "If ever there was a case in which a remedy should be fashioned, this is such a controversy." *Cheetham*, 121 R.I. at 342, 397 A.2d at 1334. Accordingly, this Court directs that the following order shall enter.

1. The petition for reargument is denied.

2. This Court is of the opinion that a sanction in the nature of counsel fees in responding to the petition for reargument is warranted. Therefore, respondent's request for a counsel fee is granted in the amount of $1500. This sum shall be paid personally by attorneys Tammelleo and Edwards and is not to be paid from any funds of the Rhode Island Ethics Commission.

Entered as an Order of this Court this 24th day of September 1998.

By Order,

/s/ Brian B. Burns
Brian B. Burns
Clerk Pro Tempore

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS SUPREME COURT

STEVEN M. CLARKE, Plaintiff-Respondent, v. RICHARD MORSILLI, in his capacity as Chairman of the Rhode Island Ethics Commission and THE RHODE ISLAND ETHICS COMMISSION, Defendants-Petitioners	)	C.A. No. MP 98-110

MEMORANDUM IN SUPPORT OF THE RHODE ISLAND ETHICS COMMISSION'S PETITION FOR REARGUMENT

I. INTRODUCTION

Pursuant to Supreme Court Rule of Appellate Procedure 25, the Rhode Island Ethics Commission (the "Commission") has filed a Petition for reargument before the full court regarding this Court's interpretation of the plain meaning of "complete its investigation" in R.I. Gen. Laws § 36-14-12(c) as reflected in this Court's Opinion dated July 14, 1998 (the "Opinion"). The Opinion is a shocking display of judicial indiscretion. It demonstrates judicial activism at its worst, in which the Court first determined what result it wished to reach and then squeezed its rationale to fit the result. The Opinion twists the facts and the law inappropriately to fit the result that the Court desired. In rejecting the Commission's agency interpretation, not only did the Court manage to fill the 8

page Opinion with factual errors (on which the Court relied) but it failed to apply its own well-settled precedent.

Interestingly, the Court rejected as unreasonable the Commission's interpretation of R.I. Gen. Laws § 36-14-12(c) when not even Justice Flanders, when a practicing attorney representing a public official charged with ethics violations before the Commission, interpreted the time limitation as applying to the probable cause hearing. As an attorney, Justice Flanders never questioned or challenged the Commission's interpretation as one would expect an attorney zealously representing his client to do if any basis to do so existed.[1] Likewise, neither the Speaker of the House of Representatives, John Harwood, nor former Chief Justice Fay, nor their attorneys, challenged the Commission's interpretation of "complete its investigation" although, in both cases, the Commission did not find probable cause within the 300 day time interpreted by this Court. The same is true for scores of other litigants before the Commission.

The Commission further seeks reargument to address the seeming breadth of the Opinion which, as written, appears to require the Commission to dismiss, among other cases, even those cases in which the Commission

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[1] Justice Flanders represented the sitting Secretary of State charged with ethics violations during a reelection campaign. Given what was at stake if the Commission found probable cause before the election, one would expect the sitting Secretary and her counsel to raise every jurisdictional, procedural or legal fight available. Notably, they did not raise the interpretation which this Court now finds so clear cut.

issued its Findings of Probable Cause within 300 days. This cannot be the result intended by this Court.

II. ARGUMENT

A. THE OPINION IS REPLETE WITH FACTUAL INACCURACIES WHICH THE COURT SHOULD CORRECT BY REARGUMENT.

If for no other reason, this Court should grant reargument to correct the numerous factual errors contained in the Opinion. The following lists some of the more egregious errors and/or misstatements:

- The Court erroneously represented that the Superior Court "further found that the commission had never made service of its amended complaint upon Clarke that introduced the Salem charges against him as required by § 36-14-12(c)(5) and that, therefore, the charges against Clarke relating to the Salem matters included in the December 28, 1994 amended complaint were a nullity." (Opinion, p. 4) To the contrary, the Superior Court did not even address this issue in its Decision. Regarding the amended complaint, the Superior Court found only that it was not timely filed. Additionally, the Commission did not file an amended complaint December 28, 1994. Pursuant to Regulation 1006, the Order and Finding of Probable Cause filed on March 30, 1996 constituted the amended complaint.

- The Court states that no "event . . . denote[s] an investigation's conclusion." (Opinion, p. 6). This is wrong. The filing of the Investigative Report denotes the conclusion of the

investigation. Since at least 1994, it has always been the practice of the Commission to file the Investigative Report in probable cause cases within the time limits of R.I. Gen. Laws § 36-14-12(c).

- This Court states that "[w]ithout an event to denote an investigation's conclusion, both the subject of the investigation and the public at large are left to wonder exactly when the investigatory phase has ended." (Opinion, p. 6). However, the legislature never intended for public disclosure. Were it not for Commission Regulation 1006(a), which calls for public disclosure after probable cause is either found or not found, the public at large would be "left to wonder" until after the full adjudication. As for the subject of the investigation, the Court either did not understand, or ignored the fact that the subject receives a copy of the Investigative Report upon filing. Contrary to the Court's finding, the subject of the investigation is not left to wonder at all and the public at large is informed because of Commission rules, not legislative action or intent.

- The Court states that in its Investigative Report, "the commission summarized its findings relevant to the Clarke investigation and introduced new charges against Clarke." (Opinion, p. 3). In reality, the Prosecutor filed the Investigative Report which summarized the facts discerned from the investigation and which recommended that the Commission add new charges involving James Salem against Clarke.

- The Court suggests that the Commission missed the statutory deadline for filing the Investigative Report by filing the Investigative Report on December 28, 1994, "six days after the statutorily imposed deadline." (Opinion, p. 2). The Court failed to note that the delay in filing the Investigative Report was due to and at the request of Clarke and his counsel. A letter from Martin Healey to Clarke's attorney, Francis Gaschen, confirms the agreement to file the Investigative Report as requested by Clarke. *See* Exhibit 1.

- This Court stated: "In this case the commission has interpreted the 'complete its investigation' language of § 36-14-12(c) to mean that it may simply state in conclusory fashion that it has finished its investigation . . . " (Opinion, p. 5). To the contrary, the Commission argued before this Court that it interpreted the statute to mean that the Commission must complete its investigation as denoted by the filing of the Investigative Report within the time limits. Thus, the filing date of the Investigative Report reflects the date on which the investigation was completed.

- This Court references the "legislative purposes embodied in the statute at issue." (Opinion, p. 6). R.I. Gen. Laws § 36-14-1 *et seq.* does not embody or articulate any purpose. This Court devised a legislative intent to fit its purpose.

- This Court stated that if the Commission's interpretation of R.I. Gen. Laws § 36-14-12 were accepted, "the subject of the 'completed' investigation . . . would remain in

> limbo, waiting for as long a time as the commission desired before the results of the 'completed' investigation were finally divulged." (Opinion, p. 7). To the contrary, the results of the completed investigation are divulged in great detail in the Investigative Report giving respondents ample notice and time to prepare their defense.[2]

These factual errors and misstatements demonstrate that the Court overlooked or failed to comprehend the Commission's procedures and arguments. Under the circumstances, this Court should grant the Commission's Petition. *Cf. Brimbau v. Ausdale Equip. Rental Corp.*, 120 R.I. 670, 672, 389 A.2d 1254 (1978).

B. THE COURT IMPERMISSIBLY LEGISLATED BY READING INTO "COMPLETE ITS INVESTIGATION" THE VERY LANGUAGE WHICH THE GENERAL ASSEMBLY HAD DELETED WHEN IT AMENDED THE STATUTE.

At page 6 of the Opinion, the Court states: "we conclude that the 'complete its investigation' language was intended by the General Assembly to mean that the commission is required to make an actual finding of probable cause within the 180-day statutory limit, subject

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[2] Further, as demonstrated by example in the Chart of Pending Adjudications, attached hereto as Exhibit 2, in 13 of 18 pending complaints, the Commission issued its Findings of Probable Cause within 300 days. Clearly, the Commission does not hold respondents "in limbo" indefinitely but makes every effort to conduct the investigation and probable cause as expeditiously as possible.

to either one or two 60-day time extensions." This Court's interpretation, however, re-inserts the very language into the statute which the General Assembly had deleted in 1992. Prior to 1992, the statute required that the Commission's investigatory committee determine whether probable cause existed to support the allegations within 180 days (300 days with two possible extensions) after the complaint was filed. *See* P.L. 1991, ch. 177 and P.L. 1987, ch. 195. In 1992, the General Assembly amended the statute by deleting the requirement that the committee resolve probable cause within 180 days, thus, requiring only that the Commission "complete its investigation" within the time limit. *See* R.I. Gen. Laws § 36-14-12(c) (P.L. ch. 436).

According to this Court's own precedent, courts must presume that the General Assembly understands and intends the nature and consequences of the changes it makes to statutes. *See Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987); *see also Little v. Conflict of Interest Comm'n*, 121 R.I. 232, 237-38, 397 A.2d 884, 887 (1979). In *DeAngelis v. Rhode Island Ethics Commission*, 656 A.2d 967, 969-70 (R.I. 1995), this Court construed P.L. 1992, ch. 436, the same public law and amendment at issue in this case, and found that "the Legislature meant precisely what it said" when it amended the ethics commission's procedures in 1992.[3] In this case, this Court ignored the General

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[3] Had the General Assembly intended the time constraint to apply, as this Court finds, to investigations *and* to probable cause, surely Speaker Harwood or his counsel, Lauren Jones, would have raised the issue before the Commission when Speaker Harwood faced ethics charges. In 1992, when the General Assembly changed the language in the statute,

Assembly's clear intent to change the procedures relating to ethics investigations and probable cause and instead, acting as a super legislature, resurrected the words previously deleted by the General Assembly. *See Dahl v. Begin*, 660 A.2d 730, 734-35 (R.I. 1995) (Ledeberg, J., dissenting) (Court should not legislate by resurrecting the language of a statute previously repealed by the legislature).

This Court has no authority to legislate. *Wayne Distrib. Co. v. Rhode Island Comm'n for Human Rights*, 673 A.2d 457, 460 (R.I. 1996) (court may not legislate by inserting words not otherwise found in statute); *New England Die Co. Inc. v. General Prod. Co., Inc.*, 92 R.I. 292, 298, 168 A.2d 150 (1961) (impermissible for court to insert words into statute unless plainly evident that drafters intended the insertion of the words); *Spear v. Respro. Inc.*, 85 R.I. 272, 280, 129 A.2d 785 (1957) (improper for court to insert or delete words in statute).

C. THE COURT FAILED TO APPLY ITS OWN WELL-ESTABLISHED PRECEDENT AND INSTEAD CONSTRUED THE STATUTE ACCORDINGLY TO ITS PARTICULAR WHIM.

In *DeAngelis v. Rhode Island Ethics Commission*, 656 A.2d at 969, this Court provided:

Harwood served in the House of Representatives. He clearly would have raised the issue had the General Assembly intended the result ordered by this Court. However, without raising the issue, Speaker Harwood entered into a settlement agreement with the Commission, which included a $5,000 payment, although the Commission failed to find probable cause within 300 days.

> This court has often stated that when a statute is expressed in clear and unambiguous terms, the work of judicial interpretation is at an end. In those circumstances the statute must be construed in accordance with the plain and literal meaning of the language contained therein.

Dart Indus., Inc. v. Clark, 696 A.2d 306, 310 (R.I. 1997) ("this Court *must interpret the statute literally and must give the words of the statute their plain and ordinary meaning.*") *Rhode Island Dept. of Elementary & Secondary Educ. v. Warwick School Comm.*, 696 A.2d 281, 284 (R.I. 1997) (when no ambiguity in statute, " 'a tribunal vested with power to consider the statute should not engage in construing the statute beyond is literal meaning.' "); *Kirby v. Panning Bd. of Review*, 634 A.2d 285, 290-91 (R.I. 1993) (when words in statute unambiguous, statute must be applied literally, without extension or construction); *In re Advisory Opinion to the Governor*, 504 A.2d 456, 459 (R.I. 1986) (plain and obvious meaning of words "is presumed to be the one intended by the Legislature, and the statute must be applied literally.").

In this case, the Court purported to support its conclusion based on the plain meaning of the words "complete its investigation." (Opinion, p. 5). However, the word "investigation" is a simple word which means what the dictionary suggests and nothing more.[4] Had the

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[4] The dictionary meaning of "investigation" is "an investigating; careful search; detailed examination." *Casinelli v. Rhode Island Ethics Commission*, slip op., pp. 11-12, C.A. No. 94-2403 (Superior Court, December, 1995) (Clifton, J.) (quoting Webster's New Universal Unabridged Dictionary, 2d. ed. New York 1983 at p. 370).

Court properly applied its analysis, it should have applied the literal, dictionary meaning of the words and the analysis applied in *Casinelli v. Rhode Island Ethics Commission*. *See DeAngelis v. Rhode Island Ethics Comm'n*, 656 A.2d at 969 (when words are unambiguous, courts must construe statutes "in accordance with the plain and literal meaning.").

In *Casinelli*, the Superior Court rejected the argument that R.I. Gen. Laws § 36-14-12 required the Commission to have completed its investigation *and* to have issued its findings of probable cause within the 180 day time limit. The court noted:

> a well-established principle that statutory terms are given their plain and ordinary meaning unless there is a contrary intent shown on the face of the statute. *Little v. Conflict of Interest Comm'n*, 121 R.I. 232, 237, 397 A.2d 884, 887 (1979). Moreover, if the language is plain and unambiguous, then there is no need for construction and the plain meaning attaches.

Id. at 11-12. The court found, based on the plain language of the statute, that "while the Commission's inquiry of the matter should be completed within the time frame set out, it is not necessary that a probable cause finding be made in order for the Ethics Commission's 'investigation [to] be completed.' " *Id.* at 12.

Rather than following its own precedent, as the *Casinelli* court did, this Court interpreted the plain language of § 36-14-12(c) by "examining both the language 'complete its investigation' and the surrounding statutory framework and . . . carefully considering the legislative purposes embodied in the statute." (Opinion, p. 6). This

Court's inquiry went beyond the literal application of the words and beyond any legislative intent which appears squarely on the face of the statute and, therefore, under this Court's own law, was improper. *See Wayne Distrib. Co.*, 673 A.2d at 460; *Kirby*, 634 A.2d at 290; *In re Advisory Opinion*, 504 A.2d at 459.

Even more shocking this Court ignored the law in the cases cited by and relied upon by this Court in its Opinion. In *Wayne Distributing Corp v. Rhode Island Commission for Human Rights*, 673 A.2d at 460-61, this Court refused to read language into a statute that did not appear on the face of the statute. The Court determined there was no need to discern the legislative intent because the language was unambiguous. *Id.* at 460. This Court rejected the Human Rights Commission's argument that the Court should construe or extend the words in the statute beyond the words on the face of the statute, finding: "we are not privileged to legislate, by inclusion, words which are not found in the statute." *Id.*

Likewise, in *Roadway Express Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673, 674-76 (R.I. 1980), this Court held that it would interpret literally the language on the face of the statute which mandated that complaints be filed within one year of a complaint. This Court determined:

> If the words used in a statute are unambiguous and convey a clear and sensible meaning we look only to those words to ascertain the intent of the Legislature. *State v. Ciarlo*, R.I., 409 A.2d 1216 (1980); *Little v. Conflict of Interest Commission*, R.I., 397 A.2d 884 (1979). Words used in a statute are accorded their plain and ordinary

> meaning unless a contrary intent appears on the face of that statute. *Id., Roe v. Affleck,* R.I., 390 A.2d 361 (1978).

Id. at 674. The Court rejected the Human Rights Commission's argument that the legislature did not intend to use the word "must" in its ordinary sense. *Id.* at 675. The Court found by using the word "must", the legislature intended to make the commission's filing of the complaint within one year mandatory. *Id.* at 676.

Comparing the Opinion with the analysis in *Wayne Distributing Co.* and *Roadway Express,* it is clear that the Court's analysis in this case was backwards. In the cases cited in its Opinion, the Court emphasized that it must look first at the words in the statute and then, only if the words are ambiguous, at the legislative intent. *Wayne Distrib. Co.,* 673 A.2d at 460; *Roadway Express,* 416 A.2d at 674. Here, the Court looked first to the legislative intent – which it devised when none was apparent on the face of the statute – and then at the plain language.

This Court makes much of the fact that *Roadway Express* was the law in 1992 when the General Assembly amended the statute. (Opinion, p. 6). Applying that analysis, the legislature presumably knew that under *Roadway Express,* the Court would interpret the words in the statute literally both when it amended the statute in 1991 by adding a time limit for finding probable cause and when it amended the statute in 1992 by deleting the reference to probable cause and applying the time limit only to investigations.

Although incongruous, perhaps the Court meant to conclude that the language "complete its investigation" is

ambiguous. If that were the case, the Court was required to give the Commission's interpretation great deference or weight even if the Court determined other interpretations possible. *See e.g., Pawtucket Power Ass'n Ltd. v. City of Pawtucket*, 622 A.2d 452, 456 (R.I. 1993). In *Pawtucket Power*, this Court held:

> it is . . . a well-recognized doctrine of administrative law that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency. Deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied.

Id. (citations omitted); *see also Asadoorian v. Warwick School Comm.*, 691 A.2d 573, 577 (R.I. 1997) (Flanders, J.) (" 'where the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as the construction is not clearly erroneous or unauthorized.' "); *Gallison v. Bristol School Comm.*, 493 A.2d 164, 166-67 (R.I. 1985) (Court affirmed agency interpretation stating courts must afford agency interpretations of statutes great deference). In this case, the Court failed to afford any deference to the Commission's interpretation.

The Court did not find, nor could it have found, that the Commission's interpretation was clearly erroneous. Otherwise, why did Justice Flanders and the other attorneys on the Chart of Pending Adjudications (Exhibit 2) fail to challenge or question the Commission's interpretation when representing public officials charged with

ethics violations? How can it be that so many esteemed lawyers and public officials all failed to challenge the Commission's interpretation if the interpretation was so unreasonable? Yet, other than Joseph Casinelli – whose challenge was rejected by a Superior Court Judge –, none of those other respondents challenged or questioned the Commission's interpretation. *See* Exhibit 2.

Not even Clarke raised the issue resolved by this Court. As noted by Judge Cresto at page 10 of his Decision, Clarke's appeal focused "upon whether the *investigation report* was filed on December 22, 1994." Clarke never questioned the Commission's interpretation of "complete its investigation" but only the timeliness of the Investigative Report. Clearly, the Commission interpretation is at least reasonable and entitled to deference by this Court. *Cf. Asadoorian,* 691 A.2d at 578.

D. AS A PRACTICAL MATTER, THIS COURT'S BROAD INTERPRETATION OF § 36-14-12(c) WILL REQUIRE DISMISSAL OF EVEN THOSE CASES WHERE THE COMMISSION FOUND PROBABLE CAUSE WITHIN 300 DAYS FROM THE FILING OF THE COMPLAINT.

The Court claims that a "clear legislative purpose" of expeditious resolution of probable cause embodied in the statute mandates that the Commission conclude probable cause within 300 days after the complaint is filed.

(Opinion, at page 7).[5] More often than not the Commission meets this time frame although not obligated to do so. For example, in 13 of the 18 cases presently pending adjudications, the Commission issued its Findings of Probable Cause within 300 days. *See* Chart of Pending Adjudications, Exhibit 2. However, given the Opinion, the Commission will be forced to dismiss those 13 cases despite the Commission's timely resolution. In those 13 cases, the Commission did not seek extensions of time permitted by § 36-14-12(c), because relying on its Regulations and on *Casinelli*, it did not believe extensions were necessary and no party challenged that belief. This Court should not put form over substance and force the Commission to dismiss even those cases in which it found probable cause within the 300 day limit but simply, and in good faith reliance on the present state of the law, did not seek extensions.

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[5] As noted, the statute does not articulate or embody any legislative purpose on its face. At most, the Court could presume that the legislature intended the expeditious resolution of the investigation phase because that is all the statute provides for. Notably, there is no time requirement in the statute, nor any reasonable mechanism provided, for adjudicating complaints once a finding of probable cause is made.

III. CONCLUSION

For the reasons stated herein, the Commission respectfully requests that the Court grant reargument before the full panel of the Court.

RHODE ISLAND ETHICS COMMISSION,
By its Attorneys,

/s/ Amelia E. Edwards
Katherine Tammelleo (#5710)
Amelia E. Edwards (#4179)
Rhode Island Ethics Commission
40 Fountain Street
Providence, RI 02903
(401) 222-3790
Fax: 272-6680

CERTIFICATE OF SERVICE

I certify that on the 20th day of July, 1998, I served a copy of the within Memorandum In Support of Rhode Island Ethics Commission's Petition For Reargument to Patrick J. Quinlan, Esquire, 55 Pine Street, Providence, RI 02903, by facsimile and by regular mail, postage prepaid.

/s/ Amelia E. Edwards

EXHIBIT 1

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

[LOGO] RHODE ISLAND ETHICS COMMISSION
43 Jefferson Boulevard
Warwick, Rhode Island 02888
(401) 277-3790

December 23, 1994

Francis A. Gaschen
255 Main Street
Pawtucket RI 02860

Re: *In Re: Steven M. Clarke, No. 94-16*

Dear Mr. Gaschen:

This will confirm our discussions of December 22, 1994. I have advised you that the investigation of the complaint in the above-referenced matter is completed. You and I have agreed that the parties will meet at 9:00 a.m. on December 27, 1994, to discuss certain matters relating to the complaint and investigation. We have further agreed, and you have advised me that Mr. Clarke also is in agreement, that I will hold the issuance of a final investigative report in this matter until after the meeting on December 27, but in no event later than December 29, 1994. I have advised you that the final date for completion of the investigation in this matter is December 22, 1994. We have agreed that there is no objection to the seven day extension of time, from December 22 to 29, for completion and/or issuance of the investigative report.

If you disagree with any of the representations stated above, please advise me of such prior to the December 27 meeting.

Very truly yours,

/s/ Martin F. Healey
Martin F. Healey
Executive Director

MFH/mh/9416/crs

PENDING ADJUDICATIONS

NAME	CASE NUMBER	180 DAY	REPORT FILED	PC FINDING	300 DAY	ATTORNEY AND FIRM
M. Smith	93-11	08/10/93	12/08/93	01/21/94	12/08/93	Joseph T. Houlihan, Esq. Corcoran, Peckham & Hayes
M. Smith	93-45	02/06/94	04/07/94	05/20/94	06/06/94	
M. Smith	93-47	02/06/94	04/07/94	05/20/94	06/06/94	
M. Smith	93-51	02/16/94	04/15/94	05/20/94	06/16/94	
M. Smith	93-61	04/04/94	04/04/94	05/20/94	08/02/94	
B. Leonard	94-11	08/17/94	08/17/94	10/20/94	12/15/94	Robert G. Flanders, Esq. Stacey P. Nakasian, Esq. Flanders & Medeiros
R. Schiedler	94-104	03/05/95	03/05/95	05/11/95	07/03/95	Michael P. DeFanti, Esq. Hinckley, Allen & Snyder
T. DiLuglio	94-110	04/01/95	07/28/95	12/01/95	07/30/95	Joseph A. Kelly, Esq. Patricia A. Buckley, Esq. Carroll, Kelly & Murphy
R. aRusso	94-111	04/01/95	07/28/95	03/07/96	07/30/95	Joseph C. Michaelson, Esq. Samuel D. Zurier, Esq. Michaelson & Michaelson
S. Hancock	95-13	08/27/95	08/25/95	11/17/95	12/25/95	Michael Horan, Esq.
R. Storti	95-14	08/27/95	08/25/95	01/18/96	12/25/95	Keith B. Kyle, Esq. Hodosh, Spinella & Angelone
K. Saucier	95-15	08/27/95	08/25/95	01/18/96	12/25/95	Keith B. Kyle, Esq. Hodosh, Spinella & Angelone
R. Johnson	95-37	01/07/96	03/04/96	04/23/96	05/06/96	John O. Lynch, Esq. Lynch & Friel

EXHIBIT 2

BEST AVAILABLE COPY

NAME	CASE NUMBER	180 DAY	REPORT FILED	PC FINDING	300 DAY	ATTORNEY AND FIRM
D. Horan	96-07	07/24/96	08/30/96	10/21/97	11/21/96	Joseph A. Kelly, Esq. Carroll, Kelly & Murphy
F. Galleshaw	96-57	05/20/97	05/19/97	08/26/97	09/17/97	David W. Carroll, Esq. Roberts, Carroll, Feldstein & Peirce
S. Day	97-09	08/24/97	08/22/97	12/22/97	12/22/97	Frederick G. Cass, Esq. Cass Law Associates
R. Halpin	97-14	09/15/97	09/15/97	11/20/97	01/13/98	William J. Burke, Esq. Linda E. Buffardi, Esq.
W. Needham	95-12	08/27/15	07/26/95	11/02/95	12/25/95	Michael Horan, Esq.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
SUPREME COURT

STEVEN M. CLARKE,

Plaintiff-Respondent,

v.

C.A. No. 98-1100

RICHARD MORSILLI, in his capacity as Chairman of the Rhode Island Ethics Commission,

Defendants-Petitioners

RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS OBJECTION TO PETITIONER'S PETITION FOR REARGUMENT

In my twenty four years of law practice, I have never before encountered such an insulting, disrespectful and outrageous document as the Petition for Reargument filed by the Ethics Commission in this case. The only hearing that the Ethics Commissions deserves is one of the award of attorneys fees and sanctions in the Respondent's case and in at least all of those cases listed in Appendix A to its Memorandum. It is difficult to respond other than to say that the Respondent Steven Clarke firmly believes in the wisdom of the Court's decision and thinks that this frivolous and outrageous motion should be swiftly and vigorously denied.

The insulting tone of the Memorandum is shocking and unforgivable. But perhaps the most galling of the Commission's argument for the Court to reverse itself is based on calling into question the defense of former clients by now-sitting Justices. This is certainly a novel

approach. The strategies that lawyers chose in vigorously defending their clients does not become precedent, even when those lawyers are subsequently appointed to the Court, even to the Supreme Court.

One of the strangest documents I have ever encountered other than from a *pro-se* litigant is the attachment to the Commission's Memorandum of a chart of those cases where the Ethics Commission has failed to meet its statutory responsibilities and deadlines. What are we to make of the inclusion of the attorneys' names and firms on this chart? Respondent suggests that the only chart that may be relevant in denying this Motion is a chart showing the name of the lawyer who prosecuted all of these cases on the chart, who missed these deadlines, who committed intentional statutory violations when he handled the *DeAngelis* case, 656 A.2d 967 (R.I. 1995), who abrogated the discovery rights of the accused in *John Does No. 1 v. R.I. Ethics Commission*, 707 A.2d 256 (R.I. 1998). See *In Re Healey*, 654 A.2d 705 (R.I. 1995). Martin Healey as the Commission's Executive Director, Prosecutor, Lobbyist, Lawyer, Clerk of the Adjudicative Court and Grand Panjandrum of ethical truth has steered this important and vital public agency down the wrong road again and again. The Commission under his mis-direction has failed to learn despite repeated reinforcement by this Court that statutory requirements are just that, *requirements*.

Although the many manifestos emitting from the Ethics Commission seem to be the embodiment of the "Truth and Justice League", the repeated trampling of the civil rights of those serve government by the Ethics Commission prosecutor has done more harm than good. If the

Ethics Commission finds it difficult and inconvenient to follow the law, where are we headed as a State?

The intemperate and tantrum like behavior evidenced in the Commission's Memorandum gives this Court some taste and flavor of the autocratic attitude which Respondents must endure at the hands of the Commission's prosecutor.

CONCLUSION

After having reviewed again the Court's decision in *Steven Clarke v. Richard Morsilli* and the precedent misquoted in the Commission's Memorandum, and after factoring the misrepresentation by the Commission of factual matter in this case once again, the Respondent remains convinced that this Court should swiftly and strongly deny the Commission's latest harangue in Motion garb. Respondent requests that this Court award him his attorneys fees incurred in defending this outrageous Petition to Reargue.

Steven M. Clarke,
By His Attorney,

/s/ Patrick J. Quinlan

Patrick J. Quinlan, Esquire
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55 Pine Street
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FAX 331-7454

CERTIFICATION

I certify that on the 23rd day of July, 1998, I served a copy of the within Respondent's Objection to Petitioner's Motion to Reargue to Amelia E. Edwards and Katherine Tammelleo at 40 Fountain Street, Providence, Rhode Island, 02903, by regular mail, postage prepaid.

/s/ Kim Sylvia
Mendenhall

July 14, 1998

Supreme Court

No. 98-110-M.P.
(PC 96-4217)

Steven M. Clarke :
:
v. :
:
Richard Morsilli et al. :
:

Present: Bourcier, Flanders, and Goldberg, J.J.

OPINION

PER CURIAM. This case came before a panel of the Supreme Court on June 16, 1998, pursuant to an order directing both parties to appear and to show cause why the issues raised should not be summarily decided. The Rhode Island Ethics Commission (commission) seeks this Court's review of a final judgment and order of the Superior Court, which reversed a decision and order of the commission because of the commission's failure to comply with the statutorily imposed time limitations set forth at G.L.1956 § 36-14-12.

Having heard the oral argument of each party's counsel and examined the memoranda submitted to this Court, we are of the opinion that cause has not been shown, and therefore, the issues shall be decided at this time.

I

Facts and Travel

On February 25, 1994, the commission received a complaint from Roger Anthony (Anthony) charging Steven M. Clarke (Clarke), an appointed member of the Rhode Island Board of Registration for Professional Engineers (the board), with multiple violations of the Rhode Island Code of Ethics stemming from Clarke's participation as a member of the board in suspending Anthony's company from the practice of engineering for one year. In his complaint Anthony disputed the propriety of Clarke's participation in those license suspension proceedings because Clarke was at the time a business competitor who stood to gain from the suspension of Anthony's company's license. In fact Clarke's firm, Commonwealth Engineering, replaced Anthony's company on a construction project in the town of Narragansett.

Upon receipt of Anthony's February 25, 1994 verified complaint, the commission sent notice to Clarke who, in turn, denied the allegations therein. The commission then pursuant to § 36-14-12 subsequently commenced an investigation in order to determine the merit of Anthony's charges. On August 19, 1994, the commission moved for a 60-day time extension pursuant to § 36-14-12(c) in order to continue the Clarke investigation that would have otherwise required completion by August 24, 1994, 180 days from the receipt of the written complaint.[1]

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[1] General Laws 1956 § 36-14-12(c), entitled "Investigative powers of the commission," provides in pertinent part:

> "Upon receipt of a written complaint alleging a violation of this chapter, the commission shall within

The commission's motion for an extension was granted, and the investigation was extended until October 23, 1994. On October 12, 1994, the commission then sought and received the issuance of a second sixty-day time extension so that the Clarke investigation could then continue until December 22, 1994.

On December 28, 1994, six days after the statutorily imposed deadline for the completion of the investigation, the commission filed an "Investigative Report and Motion to Amend Complaint," in which the commission summarized its findings relevant to the Clarke investigation and introduced new charges against Clarke for his participation as a member of the board in investigating James Salem (Salem), an individual who had falsely held himself out to be a professional engineer. In 1992 Salem performed a traffic impact study for the town of Cumberland. In conjunction with this project Salem planned to testify before the town of Cumberland's Zoning Board of Review. Upon complaint and investigation the board informed Salem that he could testify before a zoning board of review only if certain conditions were met. As a result of the board's intervention Salem was never paid for his work on the Cumberland project, and he was subsequently replaced on the project by Clarke's firm, Commonwealth Engineering.

On January 19, 1995, the commission notified Clarke concerning both the scheduling of a probable cause

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one hundred eighty (180) days of receipt of the written complaint complete its investigation; provided that, the commission may, for good cause shown, grant no more than two (2) extensions of sixty (60) days each."

hearing and his right to appear and contest the charges against him relative to both the Anthony and Salem matters. On March 29, 1995, the parties appeared before the commission and presented their cases. On March 30, 1995, the commission issued an "Order and Finding of Probable Cause" which reflected the commission's determination that probable cause existed to support both the original charges relative to the Anthony matter as well as the additional charges relative to the Salem matter. On April 3, 1996, formal hearings commenced on both the Anthony and Salem charges. Both prior to and during these hearings, Clarke moved to dismiss the charges against him arguing in support of a first prehearing motion to dismiss that the commission's investigation was impermissibly concluded after the statutory deadline set forth at § 36-14-12(c), and, in support of his second motion to dismiss, made during the hearing, that he was never served with a copy of the amended complaint as required by § 36-14-12(c)(5).[2] Both of Clarke's motions to dismiss were denied by the commission.

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[2] General Laws 1956 § 36-14-12(c)(5) entitled, "Investigative powers of the commission," states in pertinent part

> "If the commission, during the course of its investigation, has probable cause to believe that violations of this chapter, other than those contained in the complaint, have been committed, it may, upon its own motion, amend the complaint to include the violations. The commission shall, within seventy-two (72) hours of any amendment, cause a copy of the amended complaint to be served * * * upon any person alleged in the amended complaint to have committed a violation of this chapter."

On July 26, 1996, the commission issued a written decision and order. The commission dismissed the original charge lodged against Clarke as to the Anthony matter finding that there was no evidence to support a finding that Clarke had violated the code of ethics. On the amended Salem charges the commission found Clarke guilty of violating the code of ethics by his participation in investigative and enforcement actions against Salem while Clarke sat as a member of the board.

On August 5, 1996, Clarke filed a timely appeal of the commission's decision and order in the Superior Court via the Administrative Procedures Act. Thereafter, a Superior Court justice, sitting without a jury, held that the commission had impermissibly exceeded the statutory deadline for completing its investigation by failing to make a finding of probable cause by December 22, 1994. The trial justice further found that the commission had never made service of its amended complaint upon Clarke that introduced the Salem charges against him as required by § 36-14-12(c)(5) and that, therefore, the charges against Clarke relating to the Salem matters included in the December 28, 1994 amended complaint were a nullity. On February 10, 1998, a final judgment and order was entered in the Providence County Superior Court, reversing the commission's decision and order against Clarke. On March 2, 1998, the commission filed a petition with this Court, seeking the issuance of a writ of certiorari, and writ issued on April 17, 1998.

II

Analysis

In this case the commission has interpreted the "complete its investigation" language of § 36-14-12(c) to mean that it may simply state in conclusory fashion that it has finished its investigation without making a determination as to whether probable cause exists to move forward beyond the investigatory stage on the charge or charges contained in the complaint. The trial judge found this interpretation contrary to both the plain language of § 36-14-12 and the legislative intent embodied in that statute. Rather, the trial judge found that the "complete its investigation" language at issue means that the commission must make a finding as to whether probable cause exists to support the allegations of an ethics complaint within the 180-day statutory time limit subject to either one or two 60-day time extensions. We agree.

The commission, as an administrative agency, is bound by the acts of the General Assembly that empower it. In the course of performing its discrete functions, the commission, like any other administrative agency, is called upon both to interpret certain acts of the Legislature and to promulgate applicable regulations not inconsistent with its delegated authority. *Lerner v. Gill*, 463 A.2d 1352, 1358 (R.I. 1983). The Judiciary, however, sits as "final arbiter of the validity or interpretation of statutory law" as well as of any agency regulations promulgated to administer that law. *DeAngelis v. Rhode Island Ethics Commission*, 656 A.2d 967, 970 (R.I. 1995).

After examining both the language "complete its investigation" and the surrounding statutory framework

and after carefully considering the legislative purposes embodied in the statute at issue, we conclude that the "complete its investigation" language was intended by the General Assembly to mean that the commission is required to make an actual finding of probable cause within the 180-day statutory time limit, subject to either one or two 60-day time extensions which may be granted upon a showing of good cause. It is, after all, the determination by the commission as to whether probable cause exists to pursue the ethics complaint that both marks for certain the completion of a commission investigation and serves to apprise the subject of the investigation of the commission's findings. Without an event to denote an investigation's conclusion, both the subject of the investigation and the public at large are left to wonder exactly when the investigatory phase has ended.

We had occasion in *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), to consider similar investigative and complaint time requirements applicable by statute to the Rhode Island Commission for Human Rights. In *Roadway* we stated:

> "We believe that the Legislature, consistent with the language of § 28-5-18, intended that the one-year issuance period operate as a check on the commission's broad discretion to select the time to issue complaints. * * * The time limit imposed by § 28-5-18 also ensures that persons charged with violating the Act will receive notice of those charges within one year of the alleged violation. Prompt notification will

> enable such persons to investigate alleged violations and to preserve evidence necessary to conciliate or to rebut the commission's charges." 416 A.2d at 676.

We reaffirmed that position in *Wayne Distributing Co. v. Rhode Island Commission for Human Rights*, 673 A.2d 457, 461 (R.I. 1996). We note also that when the Legislature first added the 180-day complaint investigation time limitation to the commission's proceedings,[3] it was certainly aware of what we had said in *Roadway* pertaining to statutory time limitations imposed upon state agencies to investigate and complete complaint procedures, and did nothing at that time to indicate that the ethics commission complaint time limitation should be treated any differently from our reasoning and holding in *Roadway*.

The commission, for its part, urges upon us an interpretation of the statute that would allow the commission to simply state, within 180 days, that it had completed its investigation without ever having made any finding or coming to any resolution as to whether or not probable cause to further pursue the complaint was found or existed. If we were to accept that interpretation, the subject of the "completed" investigation required in the statute would remain in limbo, waiting for as long a time as the commission desired before the results of the "completed" investigation were finally divulged. As such, this interpretation by the commission is directly contradictory to the Legislature's clear purpose of ensuring that commission investigations come to an expeditious conclusion. That purpose is manifested by the Legislature's decision

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[3] Public Laws 1991, ch. 177, § 1.

to impose its 180-day statutory limitation, subject to the two 60-day extensions, upon the commission's investigatory activities. As the commission's interpretation of § 36-14-12(c) frustrates this purpose, we must reject it.

For the reasons set forth above, the commission's petition for certiorari is denied, and the writ heretofore issued is quashed. The judgment and order of the Superior Court is affirmed, and the papers of the case shall be remanded to the Superior Court.

Chief Justice Weisberger and Justice Lederberg did not participate.

Supreme Court, U.S.
FILED
FEB 1 1999
CLERK

No. 98-1055

In The

Supreme Court of the United States

October Term, 1998

AMELIA EDWARDS,

Petitioner,

v.

STEVEN M. CLARKE,

Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney for Respondent

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12 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Court should entertain this Petition, which is an original filing between these parties, in light of the constraints on the Court's original jurisdiction.

2. Whether the Rhode Island Supreme Court possesses the inherent power to impose sanctions on attorneys who use language which the court finds to be demeaning or insulting.

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In Re Perry, 918 F.2d 931 (Fed Cir. 1990) 7

Mays v. Chicago Sun-Times, 865 F.2d 134 (7th Cir. 1989) 7

Muthid v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988) 6

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COUNTER-STATEMENT OF THE CASE

Respondent herein is an engineer licensed to practice in the State of Rhode Island who had been charged by the Rhode Island Ethics Commission with a violation of the Rhode Island Ethics Law. Although prior to the initial hearing in this matter, the Respondent had petitioned the Rhode Island Supreme Court for a Writ of Certiorari to dismiss the Ethics Commission complaint due to the fact that the Ethics Commission had violated the statutory time frames, the Rhode Island Supreme Court denied the Petition for Certiorari and the hearings proceeded. At the conclusion of the hearings, the Rhode Island Ethics Commission on July 26, 1996, issued a decision and order finding the Respondent, Steven M. Clarke, in violation of the Rhode Island Code of Ethics. Mr. Clarke then filed an appeal in the Providence County Superior Court which on February 10, 1998 reversed the decision of the Ethics Commission and found that the Ethics Commission failed to complete its investigation of Clarke within the statutory time limit provided in Rhode Island General Laws §36-14-12(c).

The Ethics Commission then sought review of the Superior Court ruling by filing a Petition for Certiorari in the Rhode Island Supreme Court challenging the Superior Court's construction of Rhode Island General Laws §36-14-12(c). On July 14, 1998, the Rhode Island Supreme Court issued an opinion in *Clarke v. Morsilli*, 714 A.2d 597 (R.I. 1998) wherein it affirmed the trial court's ruling and specifically held that the statute required the Ethics Commission to complete its investigation within one hundred eighty (180) days of filing the complaint. The Rhode

Island Supreme Court also determined that the Commission, in completing its investigation, had to make a finding as to whether probable cause existed within that same time frame. On July 20, 1998, Petitioner herein, Amelia Edwards, on behalf of the Rhode Island Ethics Commission, filed a Motion for Reargument and a Memorandum in Support of Reargument (contained in Appendix 3 to Petitioner's Petition for Writ of Certiorari to this Court). On July 23, 1998, Respondent, Steven M. Clarke, through his attorney, filed an objection to the Petitioner's Motion to Reargue. In that Petition, Respondent, Steven M. Clarke, requested that the Rhode Island Supreme Court award him his attorneys fees incurred in defending the Petition to Reargue filed by the Ethics Commission (see Appendix 2 to Petitioner's Petition for Certiorari, Page 25).

Thereafter, on September 24, 1998, the Rhode Island Supreme Court issued an Order denying the Ethics Commission's Petition for Reargument and at the same time imposed sanctions in the nature of legal fees against the two Ethics Commission attorneys who had filed the Petition to Reargue. The Court's Order required that Attorneys Amelia Edwards (Petitioner herein) and Katherine Tammelleo (not a Petitioner herein), pay to Respondent Steven M. Clarke, the sum of One Thousand Five Hundred Dollars ($1,500.00) as a sanction in the nature of counsel fees for responding to the Petition for Reargument filed by the Ethics Commission. Thereafter, Petitioner Amelia Edwards did not file any papers with the Rhode Island Supreme Court other than an *ex-parte* letter to the Court protesting the award of attorneys fees. This *ex-parte* letter was returned to Ms. Edwards by the Rhode

Island Supreme Court with the suggestions that she file a Petition with the Court for reconsideration of the sanction. Ms. Edwards did not file such a Petition.

REASONS FOR DENYING THE PETITON

The Petitioner seeks a Writ of Certiorari on the basis that the award of attorney's fees and the sanction of the attorney violated the attorney's rights to freedom of expression and due process of law. Petitioner further seeks a Writ of Certiorari because the sanction was summarily imposed without prior notice, warning or opportunity to be heard. None of these grounds are substantiated in the record. For the reasons set forth in greater detail within, this Court should deny review.

I.

THIS COURT SHOULD NOT ENTERTAIN THIS PETITION WHICH IS AN ORIGINAL FILING BETWEEN THE PARTIES BECAUSE THIS COURT DOES NOT HAVE ORIGINAL JURISDICTION OVER THIS MATTER.

The Petition for Writ of Certiorari filed by Amelia Edwards is entitled *Amelia Edwards v. Steven Clarke*. There is no case or controversy between Amelia Edwards and Steven Clarke. Amelia Edwards was an attorney contractually employed by the Rhode Island Ethics Commission in the case of *Morsilli v. Clarke*. The case of *Morsilli v. Clarke* originated in the Rhode Island Superior Court and then proceeded thereafter to the Rhode Island Supreme Court. The outrageous Petition for Reargument, filed by

Attorney Amelia Edwards and Attorney Tammelleo, was filed in the matter of *Morsilli v. Clarke*. This Court does not have original jurisdiction of any controversy between Amelia Edwards and Steven Clarke. In fact, there is no case or controversy between the two. The caption of the case in this matter purports to deal with a case or controversy which does not even exist. This Court's original jurisdiction is limited by Article III of the United States Constitution and 28 U.S.C. §1251. The Petition filed by Amelia Edwards does not fit within any of the categories set forth in the constitutional or statutory empowerment of this Court's jurisdiction.

There is no case or controversy involving Ms. Edwards and Mr. Clarke which has ever been brought before any court for adjudication. A controversy must be one that is appropriate for judicial determination, must be definite and concrete concerning legal relations of the parties, and there must be a real and substantial controversy admitting of specific relief by a decree of conclusive character. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). Thus, the Court does not have jurisdiction to entertain this matter in the form presented.

II.

THE RHODE ISAND SUPREME COURT POSSESSES THE INHERENT POWER TO IMPOSE SANCTIONS ON ATTORNEYS WHO USE LANGUAGE WHICH THE COURT FINDS TO BE DEMEANING AND INSULTING.

It is axiomatic that Courts have the power to punish contempt by fine or imprisonment by attorneys or litigants before them. In fact, Rhode Island General Laws §8-6-1 empowers both the Rhode Island Supreme Court and Superior Court to punish "by fine or imprisonment or both" all contempts of their authority. The power of the Rhode Island Supreme Court to impose contempt sanctions by requiring a party to pay the opponent's attorney's fees was clearly set forth in the Rhode Island Supreme Court's decision of *Vincent v. Musone*, 574 A.2d 1234 (R.I. 1990). In *Vincent v. Musone*, the Rhode Island Supreme Court, in remanding a case to the Superior Court for a new trial, emphasized that the plaintiff shall be required to "pay the reasonable expenses incurred by the defendants in connection with first trial, including a reasonable counsel fee". *Id.* at 1235. The Court had awarded the counsel fee because it felt that justice would be served by an award of counsel fee to the defense counsel due to an undue delay by plaintiff's counsel seeking to amend his complaint. In *Vincent v. Musone*, plaintiff's counsel asked the court if the award of fees was to be considered as a sanction pursuant to Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure. The Rhode Island Supreme Court answered that the Court was not awarding fees pursuant to Rule 11 but rather was exercising its "inherent power to fashion an

appropriate remedy that would serve the ends of justice in this controversy".

Also, in *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105 (R.I. 1977), the Rhode Island Supreme Court upheld an award of attorney's fees in a civil contempt proceeding by the trial court. The court there stated "the inherent power of courts to punish for contempt of their orders has long been recognized by their jurisprudence, citing *Ex-parte Robinson*, 86 U.S. (19 Wall) 505, 510, 22 L.Ed. 205, 207 (1873). The Rhode Island Supreme Court in *Sugarman* went on to state that "numerous cases support the position that it is within the discretion of the court finding contempt to award counsel fees in order to make an innocent party whole." *See Dow Chemical Company v. Chemical Cleaning, Inc.*, 434 F.2d 1212, 1215 (5th Cir. 1970).

Federal courts have also upheld the imposition of sanctions in cases such as this. The federal courts clearly stated that an attorney sanctioned under Rule 11 has no due process right to a hearing and instead can be sanctioned based upon the record alone. *Muthid v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988). In *Muthid*, the Court noted that the District Court imposed sanctions without a full prior hearing. The Court went on to state that Rule 11 does not require a hearing in this case. Quoting the Rules Advisory Committee's note to Rule 11, the Court pointed out that because one of the parties had filed a motion asking for Rule 11 sanctions, it gave the appellants adequate notice. "The briefing process allowed them and their counsel opportunity to present evidence in argument". *Id.* at 607. The Court finally held that "we see nothing improper about basing the sanction in this case on the record alone". *Id.* at 607. It is clear that if a

party expressly states in its brief that it is seeking sanctions, then the responding party has received adequate notice to satisfy the due process clause, *In Re Perry*, 918 F.2d 931 (Fed Cir. 1990). The court in *Perry* stated that an adversarial evidentiary hearing is not required. In *Perry*, a request for counsel fees was contained in papers filed with the court. The court held that such a request in the brief satisfied the notice requirements of due process, citing *Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987); and *Mays v. Chicago Sun-Times*, 865 F.2d 134, 139 n.3 (7th Cir. 1989). Thus the Court ruled that *Perry*, having been on notice, cannot now complain about lack of due process.

The case law clearly indicates that the courts have inherent power to punish disrespectful or discourteous language. Amelia Edwards, the purported Petitioner in this case, has had ample opportunity to file a motion with the Rhode Island Supreme Court to object to the imposition of sanctions. Also, notice was provided to her in the Respondent's brief to the court, wherein he sought counsel fees.

CONCLUSION

The Rhode Island Supreme Court correctly held that Respondent was entitled to counsel fees in this matter. Petitioner did not avail herself of the avenues of relief which were available to her by filing a Motion for Reconsideration of the Sanctions. Furthermore, there does not

exist a conflict among the Circuits or any other characteristics of this case which would support a grant of the Writ and the Petition should therefore be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
FEB 1 1999
CLERK

No. 98-1055

In The

Supreme Court of the United States

October Term, 1998

AMELIA E. EDWARDS,

Petitioner,

v.

STEVEN M. CLARKE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Rhode Island

AMICUS BRIEF OF THE STATE OF RHODE ISLAND SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3181

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in the absence of a final judgment as required by 28 U.S.C. § 1257.

2. Whether this Court should entertain this Petition, which is an original filing between these parties, in light of the constraints on the Court's original jurisdiction.

3. Whether the Rhode Island Supreme Court possesses the inherent power to impose sanctions on attorneys who use language the court finds to be contemptuous, demeaning, intemperate and disrespectful.

4. Whether the request by an opposing party for attorneys' fees constitutes notice sufficient for due process purposes, and whether Petitioner's failure to respond to that request and subsequent failure to file a Motion for Reconsideration of the sanctions imposed (as suggested by the Rhode Island Supreme Court), implicates the due process provisions of the Fourteenth Amendment of the United States Constitution.

5. Whether the Rhode Island Supreme Court's imposition of sanctions upon the Petitioner violated her First Amendment rights to free speech.

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INTEREST OF AMICUS

Pursuant to Sup. Ct. R. 37.4, the State of Rhode Island, through its Attorney General, respectfully submits this brief as *amicus curiae* in opposition to the Petition for Writ of Certiorari. The State has an obvious and significant interest in the issues presented herein. The ability of the Rhode Island Supreme Court, and all of the lower courts in this State, to maintain decorum and preserve the dignity of the court must be preserved.

STATEMENT OF THE CASE

The instant petition was spawned by the latest in a series of Rhode Island Supreme Court decisions discussing the powers and authority of the Rhode Island Ethics Commission (hereinafter "the Commission"). The Commission was created by an amendment to the Rhode Island Constitution in 1986. R.I. Const. art. III, § 8. Since that time, the scope of the Commission's authority has been the subject of vigorous debate. In 1992 and 1993, in response to advisory opinion requests from the Governor, the Rhode Island Supreme Court issued decisions outlining the Commission's power. *See In re Advisory Opinion to Governor (Ethics Commission)*, 612 A.2d 1 (R.I. 1992), and *In re Advisory from the Governor*, 633 A.2d 664 (R.I. 1993). There is presently under advisement a third request for an advisory opinion from the Governor, *In re Advisory Opinion from the Governor (Rhode Island Ethics Commission – Separation of Powers)*, Rhode Island Supreme Court 1887-572 M.P., argued on November 10, 1998.

In *Clarke v. Morsilli*, 714 A.2d 597 (R.I. 1998), the case that led to the present matter, Clarke, a respondent to an ethics charge, challenged the Commission's procedure, and won. The facts and travel, set out in detail in the Petition, do not bear repeating here. The Rhode Island Supreme Court's decision in *Clarke v. Morsilli* had a rippling effect, necessitating the dismissal of other cases pending before the Commission. Given the far-reaching impact, the Commission requested reargument before the Rhode Island Supreme Court. In that Petition for Reargument, the Commission's attorney employed extremely inflammatory language. Specifically, Petitioner wrote that:

> [T]he Opinion is a shocking display of judicial indiscretion. It demonstrates judicial activism at its worst, in which the Court first determined what result it wished to reach and then squeezed its rationale to fit the result. The Opinion twists the facts and the law inappropriately to fit the result that the Court desired. In rejecting the Commission's agency interpretation, not only did the Court manage to fill the 8 page Opinion with factual errors . . . but it failed to apply its own well-settled precedent.

(Petitioner's Appendix at 3-4).[1]

Petitioner went further, highlighting for the Court the fact that one of its justices, while a private attorney in a similar case, had failed to make the argument pressed by the respondent (Clarke) in the pending case. (Pet. App. at 4). In a novel approach, Petitioner sought to have

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[1] References to Petitioner's Appendix are hereafter designated "Pet. App."

Justice Flanders vote to grant reargument by penning the following:

> As an attorney, Justice Flanders never questioned or challenged the Commission's interpretation as one would expect an attorney zealously representing his client to do.
>
> * * *
>
> Justice Flanders represented the sitting Secretary of State charged with ethics violations during a reelection campaign. Given what was at stake if the Commission found probable cause before the election, one would expect the sitting Secretary and her counsel to raise every jurisdictional, procedural or legal fight available. Notably, they did not raise the interpretation which this Court now finds so clear cut.

(Pet. App. at 4). Later in the Petition for Reargument, Petitioner wondered:

> [W]hy did Justice Flanders . . . fail to challenge or question the Commission's interpretation when representing public officials charged with ethics violations? How can it be that so many esteemed lawyers and public officials all failed to challenge the Commission's interpretation if the interpretation was so unreasonable? Yet . . . none of those other respondents challenged or questioned the Commission's interpretation.

(Pet. App. at 15-16). In addition, Petitioner wrote that "[e]ven more shocking this Court ignored the law in the cases cited by and relied upon by this Court in its Opinion." (Pet. App. at 13). Petitioner argued that the Court's analysis in *Clarke* was "backwards". (Pet. App. at 14).

Clarke's attorney objected to the Petition for Reargument. In his memorandum, he focused almost entirely on the disrespectful tone employed by the Petitioner. Clarke's response contained the following: "The only hearing that the Ethics Commission deserves is one of the award of attorneys' fees and sanctions. . . . " Clarke's counsel requested "that this Court award him his attorneys' fees incurred in defending this outrageous Petition to Reargue." (Pet. App. at 23, 25). That request for fees was dated July 23, 1998.

Petitioner did not respond to the request for attorneys' fees and sanctions. Two months later, on September 24, 1998, the Court issued an Order finding that the language of the memorandum was "contemptuous and demeaning." The Rhode Island Court noted that Petitioner's "offensive" language "undermines the efforts that this Court has initiated and encouraged in its attempts to promote civility in our courts." The Court then sanctioned the Petitioner in the amount of $1500, to be paid by counsel personally, and not by the Commission. (Pet. App. at 1, 2).

In response to that Order, Petitioner took the unusual approach of attempting to sway the Court's opinion via *ex parte* correspondence rather than a motion to reconsider. (State's Appendix at 1-4).[2] In response, the Court issued an Order on October 30, 1998, inviting her to file a Motion to Reconsider. (State App. at 5).

She declined, instead choosing to request certiorari from this Court. At this juncture, a procedural anomaly

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[2] References to the Appendix to the State's Amicus Brief are hereinafter designated "State App."

should be highlighted: at no time did Petitioner ever seek to intervene or be substituted as a party in *Clarke v. Morsilli*. Petitioner has never been a party to that case. Throughout the proceedings, Petitioner has been the attorney of record for the Commission. In order to file a Petition seeking the review of this Court, Petitioner merely inserted her name on the cover of the Petition. This is the first filing between these two parties, Amelia Edwards and Steven Clarke.

SUMMARY OF ARGUMENT

The instant Petition has two fatal procedural flaws. First, Petitioner appears to have invoked the Court's original jurisdiction by unilaterally inserting her own name as the Petitioner, without leave of any Court to do so. Next, the Order Petitioner seeks to have reviewed by this Court is not a final judgment within the meaning of 28 U.S.C. § 1257. The Rhode Island Court did not intend the September 24, 1998 Order to be final, since it invited Petitioner to request reconsideration by Order dated October 30, 1998. This Court should decline to issue certiorari, and instead allow the Rhode Island courts to fully and completely resolve this dispute.

Further, the Petitioner has not even attempted to show a split in the circuits or in the courts of the states which necessitates a review by this Court. To the contrary, as this Honorable Court knows and as the Attorney General will demonstrate, courts in every jurisdiction possess the inherent ability to sanction attorneys who use contemptuous and demeaning language within the confines of the judicial process.

It is clear that the Rhode Island Supreme Court acted well within its inherent powers in imposing sanctions considering the impudent and offensive language contained in Petitioner's memorandum. Further, the Court should decline to grant certiorari, since Petitioner in fact received notice that Clarke's attorneys were seeking attorneys' fees and sanctions. That is all the notice that the Due Process Clause of the Fourteenth Amendment requires. Likewise, the imposition of sanctions to preserve the dignity of the court did not violate the Petitioner's right to free speech.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted only for compelling reasons. Rule 10 emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Petitioner does not even attempt to demonstrate a compelling reason for this Court to undertake a review of the Rhode Island Supreme Court's imposition of sanctions. Instead, she leaps over that hurdle, and others standing in her way (discussed *infra*), launching directly into her arguments on the merits.

There is no reason for this Court to grant Petitioner's application for a writ of certiorari, as the decision of the

Rhode Island Supreme Court does not create such a conflict that the intervention of this Court is necessary. Further, the Rhode Island Supreme Court was clearly acting within its power when it imposed sanctions upon the Petitioner, and did not violate either her First or Fourteenth Amendment rights.

II. THE MATTER IS NOT RIPE FOR CERTIORARI, SINCE THERE IS NO FINAL JUDGMENT.

Under 28 U.S.C. § 1257, this Court's review of state court decisions, whether by appeal or certiorari, is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Thus the first jurisdictional prerequisite of Section 1257 is a "final" judgment or decree by the highest state court respecting the federal question. The general rule is that to be reviewable, the state court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *It must be the final word of a final court.*" *Market Street Ry. v. Railroad Comm'n*, 324 U.S. 548, 551, *reh'g denied*, 324 U.S. 890 (1945) (emphasis supplied).

Petitioner seeks to have this Court review an Order of September 24, 1998, wherein the Rhode Island Supreme Court denied a Petition for Reargument and imposed sanctions. Thereafter, Petitioner, via an *ex parte* communication to the Court, requested that the sanctions be reconsidered. (State App. at 4). In response, the court issued an order on October 30, 1998, advising Edwards that it was unable to consider the communication, but

inviting Edwards to file a motion to reconsider.[3] (State App. at 5). Petitioner declined the Court's invitation. Clearly under these particular circumstances, the Rhode Island Supreme Court did not consider the September 24 Order to be "final", and neither should this Court.

III. THE COURT SHOULD DECLINE TO EXERCISE WHAT AMOUNTS TO ORIGINAL JURISDICTION IN THIS MATTER.

This Court has original jurisdiction only in specific instances. Article III, Section 2 of the United States Constitution provides that:

> In all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.

Congress further defines this Court's jurisdiction in 28 U.S.C. § 1251, providing exclusive original jurisdiction only in controversies between states. This Court also has original, but not exclusive, jurisdiction in matters involving certain officials.

Since the first pleading with the caption *"Edwards v. Clarke"* is the instant Petition, and since the Petitioner has

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[3] Petitioner creates some confusion, because neither the Petition nor the Appendix filed in this case do not conform to the Rules of this Court. Rules 14(1)(e)(ii) and 14(1)(i)(iii) require that petitioner cite to and reprint any order "respecting rehearing". Petitioner omitted any reference to the October 30, 1998 Order, and did not reprint the one page Order in the Appendix. (State App. at 5).

not cited any authority granting original jurisdiction to this Court, certiorari should not be granted.

IV. THE RHODE ISLAND SUPREME COURT'S IMPOSITION OF SANCTIONS ON THE PETITIONERS WAS REASONABLE, APPROPRIATE, AND CONSTITUTIONALLY PERMISSIBLE.

A. The Rhode Island Supreme Court has the Inherent Power to Sanction an Attorney for the use of Disrespectful and Insulting Language in a Brief Aimed at the Court and its Members.

Petitioner argues that the Rhode Island Supreme Court has no standard of conduct for attorneys and that she did not know that the inflammatory language contained in the Petition to Reargue could possibly result in sanctions. (Petition at 8-9, 17-19). Petitioner overlooks the long line of cases which give the Rhode Island Supreme Court the inherent power to fashion a remedy when there is a wrong, and either ignores or overlooks the behavioral requirements imposed upon all counsel who practice in the State of Rhode Island.

The general powers of the Rhode Island Supreme Court were provided by the State legislature in R.I. Gen. Laws § 8-1-2 and § 8-6-1. Separately or together, these statutory provisions amplify the inherent power of the Rhode Island Supreme Court to sanction offensive conduct. In *Vincent v. Musone*, 574 A.2d 1234 (R.I. 1990), the Supreme Court imposed sanctions in the nature of counsel fees and expenses. In its decision, the court explained that such an award was not pursuant to Rule 11 of the Superior Court Rules of Civil Procedure. Rather, counsel

fees and expenses were awarded pursuant to the exercise of the court's "inherent power to fashion an appropriate remedy that would serve the ends of justice." 574 A.2d at 1235. These inherent powers have been apparent since long before the Petitioner became engaged in the practice of law. *See E.G. Hyde v. Super. Ct.*, 28 R.I. 204, 66 A.2d 292 (1907); *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105, 372 A.2d 508 (1977); *Cheetham v. Cheetham*, 121 R.I. 337, 397 A.2d 1331 (1979); *State v. Saback*, 534 A.2d 1155 (R.I. 1987); *Audette v. Coletti*, 539 A.2d 520 (R.I. 1988); *Vincent v. Musone, supra;* and *JEM Co. v. Fairway Capital Corp.*, 678 A.2d 1247 (R.I. 1996). Likewise, Rhode Island courts require attorneys to behave themselves when representing their clients. The Preamble to Rhode Island's Rules of Professional Conduct clearly states:

> [A] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Likewise, Petitioner has agreed to "speak and write civilly and respectfully in all communications with the court." Appendix "C" to Rhode Island Rules of Professional Conduct.

The well-established law in this country is that attorneys are expected to contain themselves within certain behavioral boundaries. The Rhode Island Supreme Court has always been mindful of the fact that vigorous advocacy is essential to our system of justice, but has cautioned that "[c]harges recklessly made against the court are not entitled to the protection of the right to advocate. There is no right to advocate untruth. There can be no

right in the name of advocacy to conjure up imagined wrongs and sling them with nothing but vindictive purpose." *In re Troy*, 43 R.I. 279, 290-91, 111 A. 723 (1920); *accord United States v. Cooper*, 872 F.2d 1 (1st Cir. 1989).

The cases cited by the Petitioner involve findings of contempt or sanctions pursuant to particular procedural rules, clearly distinguishable from the present case. The First Circuit has cautioned that "an attorney is not free to say literally anything and everything imaginable in a courtroom under the pretext of protecting his clients' rights to a fair trial and fair representation." *United States v. Cooper, supra*, citing *In re Little*, 404 U.S. 553 (1972); *Bar Ass'n of Greater Cleveland v. Carlin*, 67 Ohio St. 2d 311, 423 N.E.2d 1126 (1978); *In re Paulsrude*, 311 Minn. 303, 248 N.W.2d 747 (1976). Nor may an attorney seek refuge within his own First Amendment right of free speech to fill a courtroom with a "litany of speculative accusations and insults." *United States v. Cooper*, 872 F.2d at 3.

In vacating disciplinary action taken against the attorney in *United States v. Cooper, supra*, the First Circuit nonetheless issued this stern warning:

> We conclude this saga with an emphatic reminder to counsel that they indeed are subject to disciplinary sanctions . . . when their behavior in the course of representing a client offends these professional standards. We do not endorse the notion that an attorney can do or say anything and everything imaginable within the course of client representation under the guise of vigorous representation of his client.

872 F.2d at 5.

Spencer v. Dixon, 290 F.Supp. 531 (W.D.La. 1968), discussed the inherent power of the Federal Courts to command respect and impose decorum within their courtrooms. That court recognized that "all American and Anglo-Saxon courts of justice are vested by their creation with full power to impose silence, respect, and decorum in their presence by direct contempt authority. This authority is inherent and its existence essential to the preservation of law and order in judicial proceedings." 290 F.Supp. at 537. In *Ex Parte Terry*, 128 U.S. 289 (1888), this court acknowledged the rule:

> [O]f almost immemorial antiquity and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempt which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the Law. Blackstone thus states the rule: 'if the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.'

Petitioner cites with approval this Court's opinion in *Chambers v. NASCO*, 501 U.S. 32, *reh'g denied*, 501 U.S. 1269 (1991). *Chambers* supports the imposition of sanctions against the Petitioner, in that it unequivocally recognized the inherent ability of courts to "fashion an

appropriate sanction for conduct which abuses the judicial process." 501 U.S. at 44, 45. In this case, the Rhode Island court used its discretion, and the remedy fashioned was quite mild – attorneys' fees. The Court could have held Petitioner in contempt or, in light of her failure to abide by the Rules of Professional Conduct, could have initiated disciplinary proceedings. The First Circuit routinely awards costs to appellants, with little fanfare. This Court's statement in *Chambers* sums it up:

> The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses causes by his opponent's obstinacy.'

501 U.S. at 46 (quoting *Hatto v. Finney*, 437 U.S. 678, 679 (1978)).

It is entirely appropriate for the Rhode Island Supreme Court to expect a heightened standard of conduct from its attorneys. *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997) (upholding sanctions imposed for "abusive, profane, and pugnacious behavior"). Counsel never have the right to let their temper, zeal or intention lead them into disrespectful, accusative language to the court. Courts must of necessity maintain order and decorum in their presence. The fact that court and counsel disagree as to a ruling is no occasion for flagrant and open defiance of the court's authority. *See MacInnis v. United States*, 191 F.2d 157 (9th Cir. 1951).

Both state and federal courts have recognized the inherent power to impose sanctions on litigants and attorneys in order to regulate their dockets, promote judicial efficiency, and deter frivolous filings. *See Charczuk v. Commissioner of Internal Revenue*, 771 F.2d 471 (10th Cir. 1985) (imposing sanctions for bringing frivolous, unreasonable and vexacious proceedings); *State v. Caffrey*, 70 Wash.2d 120, 422 P.2d 307 (1966) (upholding a contempt finding after statement "if you can call it a courtroom" was uttered in open court); *Matter of Frerichs*, 238 N.W.2d 764 (Iowa 1976) (upholding disciplinary action against an attorney because of the likely effect of his behavior on the public's belief in the integrity of the court as an institution); *In re Buckley*, 10 Cal.3d 237, 514 P.2d 1201, 110 Cal. Rptr. 1, 121 (1973) (sanctioning attorney using the Court's inherent power). It is clear that the Rhode Island courts possess the inherent power to sanction language such as that employed by the Petitioner. There is thus no reason to grant certiorari.

B. A Request for Attorneys' Fees Contained in a Pleading is Sufficient Notice for Due Process purposes.

Petitioner repeatedly laments that the sanctions at issue were imposed without notice and opportunity to be heard. (Petition, at pgs. 6-7, 8, 9, 13, 19 and 21). Nowhere in the Petition does she acknowledge that Clarke's attorney twice requested that the Rhode Island Supreme Court award attorney's fees. (Pet. App. at 23, 25). Nor does she explain her inaction in the face of that motion or her silence following the October 30, 1998 Order.

Due process is a flexible concept, and the particular procedural protections vary, depending upon all the circumstances. The basic requirements of due process with respect to the assessment of costs, expenses, or attorneys' fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond. *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987), and cases cited therein. The instant Petition fails to state how the notice was deficient. Rather, Petitioner argues that she failed to receive notice and a hearing, as if repeating it often enough will make it so. It is beyond dispute that the motion asking for sanctions and attorneys' fees gave adequate notice for due process purposes. *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988); *Principle v. Assay Partners*, 586 N.Y.S.2d 182 (1992); *Mission Denver Co. v. Pierson*, 674 P.2d 363, 366 (Co. 1984); *In re Perry*, 918 F.2d 931 (Fed. Cir. 1990). There is no requirement that an evidentiary or other hearing be held before the imposition of sanctions. *Travelers Insurance Co. v. St. Jude Hospital of Kenner, La.*, 38 F.3d 1414 (5th Cir. 1994); *accord Muthig v. Brant Point Nantucket, Inc., supra*. The general rule is that the dictates of due process are satisfied where the sanctioned party has a real and full opportunity to explain the questionable conduct before sanctions are imposed. *See Kraszewski v. State Farm General Insurance Co.*, 130 F.R.D. 111 (M.D. Cal. 1984), and cases cited therein. In this case Petitioner had notice that the opposing attorney was seeking sanctions, and chose not to respond. The Supreme Court offered the opportunity to request a hearing on the issue. Again, Petitioner chose to remain silent, as did the attorney in *Kunik v. Racine County, Wis.*, 946 F.2d 1574 (7th Cir. 1991). As in *Kunik*, any procedural

omissions were the result of Petitioner's own inaction, and not of the court's making.

Petitioner herein explains her silence by arguing that there is no mechanism in the Rhode Island courts to respond to the pleading filed by Clarke's counsel. That argument lacks any vitality whatsoever. Although contained in an objection to a Petitioner for Reargument, Clarke's counsel clearly made a motion for attorneys' fees and sanctions. Under Rule 28 of the Rhode Island Rules of Appellate Procedure, a response to such a motion must be filed within ten days. Further, if there was any doubt in her mind, Rule 2 of the Rhode Island Rules of Appellate Procedure provides for their suspension for "good cause shown." This Rule would clearly have allowed her to file an Objection to the fee request. Nothing can excuse or explain such inaction.

This court has stated that the requirement of due process of law is applicable to a proceeding to impose sanctions, thereby entitling a party or attorney to notice and opportunity to respond, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). However, the right to a hearing in these circumstances is obviously limited to cases where such a hearing could assist the court in its decision. Whether a sanctioned attorney acted in good faith is not material if the conduct was objectively unreasonable. *Kapco Mfg. Co. v. C & O Enterprises*, 886 F.2d 1485 (7th Cir. 1989). Where the sanctionable conduct occurred in documents filed with the court, there are no issues that a hearing could illuminate, and hence, the hearing would be pointless. *Kapco, supra; MacInnis v. United States*, 191 F.2d at 160; *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192 (7th Cir. 1987).

Since the request for attorneys' fees and sanctions was contained in a pleading filed with the Rhode Island Supreme Court and served upon the Petitioner, the notice requirements of due process were satisfied. *In re Perry, supra; Braley v. Campbell, supra; Mays v. Chicago Sun-Times,* 865 F.2d 134, 139, n.3 (7th Cir. 1989). Having been clearly on notice, and having twice been given and twice declined an opportunity to be heard, Petitioner cannot now be heard to complain of lack of due process. *In re Perry,* 918 F.2d at 935. Nor was an evidentiary hearing required, since the sanctioned conduct consisted of written statements filed with the Court. The conduct was objectively unreasonable, and no hearing was required. Certiorari should not be granted.

C. The Imposition of Sanctions for Disrespectful and Insulting Language in a Brief Aimed at the Court and its Members Does Not Violate the Petitioner's First Amendment Rights Guarantees of Free Speech.

Petitioner relies on Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nev.,* 501 U.S. 1030 (1991) in support of her argument that the Rhode Island Supreme Court's action violated her right to free speech. *Gentile's* plurality opinion does not compel the grant of certiorari in this case.

In *Gentile,* an attorney was disciplined for holding a press conference following his client's indictment on state criminal charges. The statements made during that press conference were extremely critical of the Las Vegas Police Department and District Attorney's Office. The Nevada Supreme Court had a rule limiting the public statements

that could be made by a trial attorney regarding a pending criminal matter.

In reversing the disciplinary action taken against the attorney, a majority of this Court nonetheless recognized that during a judicial proceeding, whatever right to free speech an attorney has is "extremely circumscribed." 501 U.S. at 1071. This Court cited with approval *In re Cohen*, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E.2d 672, 675 (1960), as recognizing the "long-established principle" that a lawyer:

> [a]s a citizen could not be denied any of the common rights of citizens, but he stood before the [court] in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, and instrument . . . of justice . . . ' (citation omitted).

This court in *Gentile* reminds us all that "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press", since "[l]awyers representing clients in pending cases are key participants in the . . . justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." 501 U.S. at 1074.

The disciplinary action taken in *Gentile* was reversed, since this Court categorized the speech at issue as classic political speech directed at public officials and their conduct in office. The same cannot be said of Petitioner's statements herein. The Constitution does not give attorneys the same freedom as participants in political debate. *Gentile, supra; Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995).

Petitioner's statements were made not in a public or political forum, but in a memorandum addressed to the Court advocating her client's position. As in *Spencer v. Dixon, supra,* Petitioner has cited to "no case of any appellate tribunal or court of original jurisdiction which ever has interdicted as unconstitutional the contempt authority of a court to punish irrelevant, insulting, abusive, or grossly discourteous language in criticism of a judge or officer of the court in a pleading filed with the court." 290 F.Supp. at 537. Such language contains "no constitutional protection and so has been held by definitive opinions of appellate tribunals, especially by the Supreme Court of the United States." 290 F.Supp. at 537 (quoting *In re Sawyer,* 360 U.S. 622 (1959) and *Fisher v. Pace,* 336 U.S. 155 (1949). In finding the complaining attorney in contempt of court, the court in *Spencer v. Dixon, supra,* noted that "[n]o court has suggested that judges are without authority to control scurrilous and defamatory pleading content, as respects duly constituted members of the judiciary, State or Federal." 290 F.Supp. at 538.

Other courts have rejected the argument that sanctions imposed on an attorney for language used during a judicial proceeding violated the free speech rights of the attorney. *See Carroll v. Jaques Admiralty Law Firm, supra; Attorney Grievance Commission v. Alison,* 317 Md. 523, 565 A.2d 660 (1989); *State v. Bomer,* 162 S.W.2d 515 (Tn. 1942), *cert. denied,* 318 U.S. 771 (1943); *Matter of Frerichs, supra.*

It is clear that the Petitioner was appropriately sanctioned for her criticisms of the Rhode Island Supreme

Court and its justices. Since her First Amendment rights were not implicated, certiorari should be denied.

V. CONCLUSION

The Rhode Island Supreme Court exercised its inherent power in sanctioning Petitioner for the language contained in her memorandum. Since Petitioner had notice that sanctions were requested by opposing counsel and could have explained her conduct but chose not to do so, there was no due process violation. Finally, the imposition of sanctions did not violate Petitioner's First Amendment right to freedom of speech. The courts of the State of Rhode Island must retain the power and authority to demand that attorneys behave in a professional manner. Petitioner seeks to eliminate that power. This Court should decline Petitioner's invitation, and refuse to grant certiorari.

Respectfully submitted,

State of Rhode Island
By Its Attorney

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APPENDIX

YESSER
GLASSON
& DINEEN

October 24, 1998

Counselors at Law

The Honorable Joseph R. Weisberger
The Honorable Victoria Lederberg
The Honorable John P. Bourcier
The Honorable Robert G. Flanders
The Honorable Maureen McKenna Goldberg
Rhode Island Supreme Court
250 Benefit Street
Providence, RI 02903

Re: Clarke v. Morsilli, et al.
C.A. No. 98-110-M.P.

Dear Justices:

On September 24, 1998, this Court issued an Order (the "Order") denying the Rhode Island Ethics Commission's (the "Commission") Petition for Reargument (the "Petition") in the above-referenced case. I respectfully request that this Court rescind the Order except for the portion which denied the Commission's Petition. In the alternative, I ask that the Court amend the Order to rescind the attorneys' fees and delete any reference to Katherine Tammelleo. I make these requests personally and not in my role as Legal Counsel to the Commission.

My reasons for this request are as follows: I filed the Petition on behalf of the Commission pursuant to Supreme Court Rule of appellate Procedure 25. As this Court held in *Brimbau v. Ausdale Equipment Rental Corp.*,

120 R.I. 670, 389 A.2d 1254 (1978), the purpose of a petition for reargument is to provide a petitioner the opportunity to address matters which the petitioner believes the Court misapplied or overlooked. The Petition which I filed did just that. I have taken full responsibility for the Petition. Ms. Tammelleo did not sign the Petition. She should not have her reputation suffer because her name happened to be included with mine in the Petition.

The Petition was not intended to be demeaning to or contemptuous of the Court. Rather, the Petition used strong, forceful, and pointed language to emphasize the serious consequences of this Court's July 17, 1998 Opinion. The language used in the Petition was similar to language used by other attorneys in recent filings with the Court which passed without rebuke or even comment, let alone the imposition of a monetary sanction. By way of example, in a Brief filed with this Court, appellant's counsel said the following about the trial court:

"These findings [by the court] are indeed startling, because they are so patently and demonstrably erroneous."

"Further, this brief will demonstrate that the court's finding . . . is quite farcical."

"The court's reasoning, moreover . . . appears especially contrived."

" . . . the court's reasoning is self-contradictory . . . "

"This charge [by the court] entails an odious assault [on an attorney], a result the court could only reach by ignoring the factual record before it."

"The court's claim is . . . preposterous . . . "

"The trial justice's misapprehension of the nature of the issue before him is manifest from the record and from the rulings. . . . "

This language is as strong and forceful, if not more so, than the language in the Petition. Yet, this Court in its decision of the matter above did not even mention the pointed attack on the judiciary as a matter of concern. Thus, in one instance, the Court accepted such language without comment and, in another instance, the Court penalized the attorney with monetary sanctions for the use of such language.

In addition, given the language used by this Court in the Order, it appears that the Court sanctioned me for contempt but ordered me to pay attorneys' fees. That being the case, the Court found me in contempt and imposed a monetary fine without a hearing or even notice. The Court's action raises serious constitutional problems. By failing to provide me with any notice, hearing or warning and by failing to reference the rule or standard which the Court claims I violated, the Court violated my right to due process. Additionally, the Court has chilled legal counsels' willingness to zealously advocate on behalf of clients. Finally, the Court awarded attorneys' fees of $1,500, a substantial fee, without any affidavit or other evidence to support the attorneys' fees ordered.

I do not intend by this letter to further antagonize this Court. I simply wish to address the legal implications of this Court's Order. For the reasons stated herein, I respectfully ask that the Court rescind the entire Order except for the portion of the Order which denied the Petition. In the alternative, I ask that this Court amend

the Order to rescind the attorneys' fee award and delete any reference to Katherine Tammelleo.

Very truly yours,

/s/ Amelia E. Edwards
Amelia E. Edwards

Supreme Court

No. 98-110-M.P.
(PC 96-4217)

Steven M. Clarke :
:
v. :
:
Richard Morsilli et al. :

ORDER

Subsequent to the denial by this court of a petition for reargument, Amelia E. Edwards, Attorney at Law, attorney for the petitioner mailed a letter to the justices of this Court asking for certain relief on her own behalf and on behalf of Attorney Katherine Tammelleo.

This letter constituted an ex parte communication to the members of the Court which cannot be considered.

In the event that either counsel desires to seek relief from a prior order of this Court, such counsel should file a petition in accordance with the provisions of Rule 18 of the Supreme Court Rules of Appellate Procedure. Such a petition should be filed with the clerk and copies should be sent to counsel of record for the opposing party.

Entered as an Order of this Court this 30th day of October 1998.

By Order,

/s/ Michael Cafferty
Clerk